91-582

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ELIZABETH LAYMAN,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals and the District Court erred in holding, contrary to decisions of other circuit courts, that a discriminatory act against Elizabeth Layman occurring within the limitation period is not sufficient to toll limitations on her age discrimination claims under a ''continuing violations'' theory?

2. Whether the Court of Appeals and the District Court erred, as a matter of law, in holding that:

(a) Elizabeth Layman may not rely upon Defendant Xerox Corporation's fraudulent misrepresentation that no jobs existed in Dallas in proving her claim of fraud, and

(b) Elizabeth Layman failed to put forth substantial evidence of her fraud claim?

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Elizabeth Layman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 1, 1991.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case in this Court.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

Cases vi

Statutes ix

OPINION BELOW ix

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ix

STATUTORY PROVISIONS INVOLVED x

STATEMENT OF THE CASE 1

A. Procedural History 1

B. Statement of Facts 3

REASONS FOR GRANTING THE WRIT 6

PAGE

I. CONFLICT, CONFUSION, AND UNCERTAINTY EXIST AMONG AND WITHIN THE CIRCUIT COURTS OVER HOW TO APPLY THE EQUITABLE THEORY OF "CONTINUING VIOLATIONS" TO TOLL THE STATUTE OF LIMITATIONS ON CAUSES OF ACTION FOR DISCRIMINATION 6

II. EVEN APPLYING THE FIFTH CIRCUIT'S TEST, THE COURT OF APPEALS ERRED IN HOLDING THAT LIMITATIONS WERE NOT TOLLED ON LAYMAN'S AGE DISCRIMINATION CLAIMS 11

III. THE COURT OF APPEALS ERRED IN ITS FINDING THAT LAYMAN WAS NOT ENTITLED TO BASE HER CLAIM OF FRAUD ON XEROX'S MISREPRESENTATION OF NO AVAILABLE DALLAS JOBS 16

IV. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S APPLICATION OF THE RULES FOR ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT TO THE FACTS SUPPORTING LAYMAN'S FRAUD CLAIM 19

PAGE

A. PROMISE OF A SPECIFIC JOB 24

B. THE INTENT ISSUE 25

CONCLUSION 29

APPENDIX 1a

APPENDIX

A. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 1a

B. JUDGMENT AND MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS 16a

C. STATUTES INVOLVED IN THE CASE 59a

TABLE OF AUTHORITIES

Cases **PAGE**

Abrams v. Baylor College of Medicine,
805 F.2d 528 (5th Cir. 1986) 7, 11, 14, 15

Berry v. Board of Supervisors of L.S.U.,
715 F.2d 971(5th Cir. 1983), *cert. denied,*
479 U.S. 868, 107 S.Ct. 232,
93 L.Ed.2d 158 (1986) 7, 8, 12

Blumberg v. HCA Management Co.,
848 F.2d 642 (5th Cir. 1988), *cert. denied,*
488 U.S. 1007, 109 S.Ct. 789,
__ L.Ed.2d __(1989) 7

Boeing Co. v. Shipman, 411 F.2d 365
(5th Cir. 1969) (en banc) 19, 20, 24,
25, 26, 28

Boyle v. Pool Offshore Co.,
893 F.2d 713 (5th Cir. 1990) 19,25

Chapman v. Homeco, Inc., 886 F.2d 756
(5th Cir. 1989) *cert. denied,* __ U.S. __,
110 S.Ct. 1784, 108 L.Ed.2d
785 (1990) 7

Chappel v. Emco Machine Works Co., 601
F.2d 1295 (5th Cir. 1979) 13

Clark v. Resistoflex Co., 854 F.2d 762
(5th Cir. 1988) 7

Cases *(Cont.)* **PAGE**

Dumas v. Town of Mount Vernon,
612 F.2d 974 (5th Cir. 1980) 8

Flannery v. Carrol, 676 F.2d 126
(5th Cir. 1982) 18

Furr v. AT&T Technologies, Inc.,
824 F.2d 1537 (10th Cir. 1987) 9

Gibraltar Savings v. LDBrinkman Corp.,
860 F.2d 1275 (5th Cir. 1988)
cert. denied, _ U.S. _, 109 S.Ct.
2432, 104 L.Ed.2d 988, (1989) 25

Glass v. Petro-Tex Chemical Corp.,
757 F.2d 1554 (5th Cir. 1985) 8, 12, 13

Gray v. Phillips Petroleum Company,
858 F.2d 610 (10th Cir. 1988) 10

Johnson v. General Electric, 840 F.2d 132
(1st Cir. 1988) 9

McKenzie v. Sawyer, 684 F.2d 62
(D.C. Cir. 1982) 9

Mennor v. Fort Hood Nat'l Bank,
829 F.2d 553 (5th Cir. 1987) 7

Miller v. Safeco Title Ins. Co.,
758 F.2d 364 (9th Cir. 1985) 18

Cases ***(Cont.)*** **PAGE**

New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc., 703 S.W.2d 209 (Tex. App. --Houston [1st Dist.] 1985, writ ref'd n.r.e.) 20, 21

Randolph County v. Alabama Power Co., 784 F.2d 1067, (11th Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 832 (1987) 18

Scarlett v. Seaboard Coast Line Railroad Co., 676 F.2d 1043 (5th Cir. 1982) 8

Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432 (Tex. 1986) 20, 21

Trenholm v. Ratcliff, 646 S.W.2d 927 (Tex. 1983) 20, 21

Turner v. Briscoe, 171 S.W.2d 118 (Tex. Comm'n. App. 1943, judgment adopted) 23

United Airlines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) 9

Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) 7, 9, 11, 15

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) 9

Zipes v. Trans World Airlines, Inc., 445 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982) 7

Statutes **PAGE**

28 U.S.C. §1254(1) ix

29 U.S.C. §621 *et. seq.* 1

29 U.S.C. §626(d)(2) 7

42 U.S.C. §2000e-5(e) 7

42 U.S.C. §2000e *et. seq.* 1

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, not reported, appears in Appendix A hereto. The District Court's Judgment and Memorandum Opinion and Order, not reported, are reproduced in Appendix B hereto.

STATEMENT OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, announced on July 1, 1991. This petition is timely filed within ninety days after judgment. Jurisdiction of this Court to review the judgment in question by a writ of certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions which this case involves are:

29 U.S.C. §621 *et. seq.*

29 U.S.C. §626(d)(2)

42 U.S.C. §2000e-5(e)

See Appendix C for full text.

STATEMENT OF THE CASE

A. Procedural History

At all pertinent times to her claims and causes of action, Elizabeth Layman ("Layman") has been a Texas resident over 40 years of age, and thus has been within the protected age group under the Age Discrimination in Employment Act, Public Law 90-202, December 15, 1967; 82 Stat. 602; 29 U.S.C. §621 *et. seq.*, and as amended, 1978 ("ADEA"). On May 11, 1987 Layman filed a Charge of Discrimination, No. 310872267 against Xerox with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission ("EEOC"). She alleged discrimination by Xerox on the basis of her age and sex in compensation, promotion, transfer, job assignment, employment opportunities, as well as discrimination in terms of her employment privileges, conditions and benefits. Layman further alleged Xerox retaliated against her for filing an internal Xerox complaint in 1984 and that she relied on Xerox's assurances of nonretaliation to her detriment. Layman was subjected to treatment which constitutes constructive termination. The EEOC issued Plaintiff's Notice of Right to Sue under Title VII on August 26, 1988.

Layman filed Plaintiff's Original Complaint on July 10, 1987, her First Amended Complaint on November 9, 1988, and her Second Amended Complaint on July 27, 1989, asserting claims under the ADEA and the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.*, (Title VII), against Xerox. She also alleged negligent and intentional misrepresentation, negligent and intentional infliction of emotional distress, breach of employment contract for California employment, breach of employment contract regarding written Xerox procedures and breach of implied covenant of good faith and fair dealing. Xerox denied these allegations in its Answer to Plaintiff's

Original Complaint filed September 1, 1987 and its Second Amended Complaint filed October 2, 1989.

Xerox filed its Counterclaim on October 31, 1988 and Second Amended Counterclaim on October 2, 1989 seeking damages against Layman on the basis of alleged fraud concerning her California relocation commitment and for breach of at-will employment. In the alternative, Xerox sought damages for breach of the employment contract and breach of the duty of good faith and fair dealing if they were found to exist.

On August 11, 1989, Summary Judgment was granted in favor of Xerox as to all of Layman's claims except those pursuant to the ADEA, Title VII, fraud and breach of duty of good faith and fair dealing. The parties proceeded to trial on the remaining claims in Plaintiff's Second Amended Complaint and Defendant's Second Amended Counterclaim.

Layman's ADEA, fraud and breach of the duty of good faith and fair dealing claims and Xerox's claims were tried to the jury. Layman's Title VII claims were tried simultaneously to the bench. Xerox was granted a directed verdict on Layman's claim for breach of the duty of good faith and fair dealing prior to submission of the issues to the jury.

The jury returned its verdict on January 9, 1990, in favor of Layman, awarding $145,000.00 in actual damages on her ADEA claim, and $139,716.00 in compensatory damages and $8,750,000.00 in punitive damages on her fraud claim. Additionally, the jury made an affirmative finding of willfulness in connection with Layman's ADEA claim. Xerox was awarded nothing on its counterclaims.

Plaintiff filed her Motion for Entry of Judgment on January 29, 1990, and her Supplement To Motion For Entry Of Judgment on February 14, 1990. On January 30 and 31, 1990, Xerox filed its Motion for New Trial, its Motion for Entry of Judgment on Layman's Gender Discrimination Claim and Xerox's Counter-

claim for Breach of At-Will Employment Relationship, and its Motion for Judgment Non Obstante Verdicto.

On September 17, 1990, the Honorable Sidney A. Fitzwater, signed his Memorandum Opinion and Order granting Xerox's Motion for Judgment Non Obstante Verdicto, and entered a take nothing Judgment against Layman on all her claims against Xerox, as well as judgment based upon the jury verdict that Xerox takes nothing from Layman on its Counterclaim.

On October 1, 1990, Xerox filed its Motion And Brief To Alter or Amend Memorandum Opinion And Order And Request For Ruling On Motion For New Trial (the "Motion"), requesting that the Court determine whether the Motion For New Trial should be granted if the Judgment should later be vacated or reversed. In its Motion For New Trial, Xerox seeks a new trial on all issues, including Xerox's Counterclaim for fraud. On October 2, 1990, the Court entered its Order denying Xerox's request for the conditional granting of a Motion For New Trial.

On appeal, Layman urged the Fifth Circuit to reconsider the judgment of the District Court. On July 1, 1991, the Fifth Circuit affirmed the judgment of the District Court.

B. Statement of Facts

Layman was employed by Defendant Xerox Corporation ("Xerox") on May 27, 1980 as an Engineering Specialist II. Xerox rewarded Layman's excellent work with positive evaluations, promotions, bonuses and awards, including the Xerox "Pursuit of Excellence" award. In 1984, Layman learned that her position had been downgraded. In June 1984, Layman wrote to David Kearns, Xerox's President, to bring her problems to his attention. Kearns responded that there had been an investigation and he was satisfied that Layman had not been treated differently from other employees. Layman relied upon these reassurances

though later she learned that they were false. Layman was informed her position as Software Marketing Manager had been eliminated by reorganization, although Layman later learned that the duties and responsibilities of the Software Marketing position had been awarded to Joan Bigham, an employee who was under 40 years of age and less qualified for the position. Layman was later moved into Bigham's organization.

During the course of her employment in Bigham's organization (from April 1985 to summer 1987), Layman was subject to disparate treatment and harassment by Bigham, Wendell Wilson and other members of the organization. The record is replete with evidence of harassment levelled at Layman. One method of harassment was to subject Layman to baseless criticisms. For instance, Layman was criticized for being away from the office despite the fact that she was required to travel for her work. She was not provided with a computer with which to perform her job responsibilities, and was told there were insufficient funds available to acquire a computer for her despite the fact that Wilson, an employee less than 40 years of age, made substantial expenditures for his wife's travel, consulting fees and software and games for his children at Xerox's expense. Wilson also had two computer systems in his office, one at home and an additional lap top computer purchased at Xerox's expense. Obviously, there were sufficient funds for a computer for Layman.

Wilson and Bigham likewise attempted to erode Layman's job duties and responsibilities and transfer the responsibilities to other Xerox employees who were less than 40 years old including, Jeff Bliss and Judy Irving. Wilson replaced Layman as the Rochester team program representative with Judy Irving. Wilson and Bigham ignored Layman's requests for further work assignments and job responsibilities. When Bigham began spending most of her time in the Rochester office, Layman inquired into the availability of Bigham's position, but was told

the position was not available, that Wilson would not be assuming the position and that she would be considered if it became available. Despite such representation, Wilson was subsequently appointed acting manager in Bigham's place without consideration of Layman.

Layman was not provided with Xerox quality training due to alleged lack of funds, while Wilson was making the improper expenditures described above. Wilson subjected Layman to his whims concerning whether she would be allowed to travel despite the fact it was necessary for her job. Wilson issued blanket approval for all other members of the group to travel while denying such approval to Layman. The security of Layman's office was destroyed, with employees removing files, equipment and her telephone from the office without her knowledge or consent. Wilson also cancelled Layman's long distance telephone charge number for no apparent reason. The ultimate insult was that the furniture was removed from Layman's office, and she was forced to borrow equipment in order to perform her job.

In October 1986, Xerox announced that because of reorganization no jobs would be available in Dallas for Layman's group because all marketing jobs were to be consolidated in California, but a guaranteed job in Robert Knight's organization was promised to anyone who agreed to relocate to California. Xerox however, intentionally kept information from Layman regarding jobs which were available in Dallas and for which she was qualified while providing the same information to other employees including Wendell Wilson.

Faced with an up or out decision, Layman accepted relocation on the condition that she receive the same or comparable job in California. Xerox accepted the condition, and told Layman she would be in California working "five days a week" by January 1987. Xerox, however, pursued a course of conduct demonstrating that it never intended to keep its promise to

Layman. Consequently, Layman sold her house and prepared to move. However, no specific job offer was forthcoming. Xerox reduced her job responsibilities and failed to provide her with work assignments or a transfer to California, despite constant promises to the contrary.

In April 1987, Xerox claimed it had found a temporary job for Layman, but such a claim proved vaporous as Xerox failed to ever provide her with a written description of the job or an offer directed to her for acceptance. In July 1987, Xerox telephoned Layman and claimed to have a job offer for Layman in California. Xerox again failed to provide her with a written job offer and a copy of the job description for her evaluation and acceptance. Layman never received the job description. Subsequently Layman received the offer letter, but the offer was withdrawn before she could respond.

REASONS FOR GRANTING THE WRIT

I. CONFLICT, CONFUSION, AND UNCERTAINTY EXIST AMONG AND WITHIN THE CIRCUIT COURTS OVER HOW TO APPLY THE EQUITABLE THEORY OF "CONTINUING VIOLATIONS" TO TOLL THE STATUTE OF LIMITATIONS ON CAUSES OF ACTION FOR DISCRIMINATION.

There is clear conflict among the Circuit Courts in their application of the statute of limitations in ADEA cases. The Ninth, First and Tenth Circuit Courts look to whether a discriminatory policy was in place, and if so whether one discrete act of discrimination occurred during the limitation period. The Fifth Circuit applies a cumbersome 3 part test with mixed results. Consequently, as discussed below, a review of the standards

required to toll the limitations period under a continuing violations theory is warranted by this Court.

To bring an ADEA claim, the plaintiff must first file a charge of unlawful discrimination with the EEOC. In Texas, because it is a deferral state, the plaintiff must file the EEOC charge within 300 days after the alleged wrongful act occurred. 42 U.S.C. §2000e-5(e); 29 U.S.C. §626(d)(2); *Mennor v. Fort Hood Nat'l Bank,* 829 F.2d 553, 554-55 (5th Cir. 1987); *Clark v. Resistoflex Co.,* 854 F.2d 762, 765 (5th Cir. 1988). The limitations period ordinarily begins on the date the unlawful practice occurred. *Chapman v. Homeco, Inc.,* 886 F.2d 756, 758 (5th Cir. 1989), *cert. denied,* __ U.S. __, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990). Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines, Inc.,* 445 U.S. 385, 102 S.Ct. 1127, 1132, 71 L.Ed.2d 234 (1982). The 300 day period has been held not to be jurisdictional, but to operate as a limitations period. *Blumberg v. HCA Management Co.,* 848 F.2d 642, 644 (5th Cir. 1988), *cert. denied,* 488 U.S. 1007, 109 S.Ct. 789, __ L.Ed.2d (1989). Layman filed her EEOC claim on May 11, 1987 more than 300 days after certain representations and actions by Xerox.

An equitable exception, to the limitations period is the "continuing violation" which arises "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Waltman v. International Paper Co.,* 875 F.2d 468, 474 (5th Cir. 1989) (quoting *Abrams v. Baylor College of Medicine,* 805 F.2d 528, 532 (5th Cir. 1986).

The continuing violation theory, the precise contours and theoretical basis of which are at best unclear, relieves a plaintiff who makes such a claim from the burden of proving that the entire violation occurred within the actionable period. *Berry v.*

Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983), *cert. denied,* 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158 (1986). The application of the theory is difficult. The Fifth Circuit in *Glass v. Petro-Tex Chemical Corp.* notes that "[o]n at least three occasions, we have stated that the '[c]ase law on the subject of continuing violations is 'inconsistent and confining'....' *Dumas v. Town of Mount Vernon,* 612 F.2d 974, 977 (5th Cir. 1980); *Scarlett v. Seaboard Coast Line Railroad Co.,* 676 F.2d 1043, 1049 (5th Cir. 1982); *Berry v. Board of Supervisors of L.S.U.,* 715 F.2d 971, 979 n. 11 (5th Cir. 1983)." 757 F.2d 1554 (5th Cir. 1985) (emphasis added).

The conflict among the Circuit Courts of Appeal in their application of the continued violation theory to toll the statute of limitations is based in part on the Fifth Circuit's adherence to a cumbersome three part test. The Fifth Circuit, applies the following three part test in a continuing violation case: (1) whether the alleged acts involved the same type of discrimination, tending to connect them in a continuing violation; (2) whether the alleged acts are recurring versus isolated work assignments or employment decisions; and (3) whether the acts have a degree of permanence which would trigger an employee's awareness of a duty to assert his or her rights. *Berry v. Board of Supervisors of L.S.U.,* 715 F.2d at 981.

The application of the three part test to specific cases has, at best, resulted in inconsistency and uncertainty in the determination of whether the statute of limitations has barred the discrimination claim. In *Glass v. Petro-Tex Chemical Corp.*, the court held that Glass being passed over for promotion on three distinct occasions, the last falling within the limitations period, was sufficient to toll the statute of limitations and enable Glass to file suit for all discriminatory acts. 757 F.2d 1554. In the present case, however, the denial of promotions and various other discriminatory acts within the limitation period were held not to satisfy the three part tests set forth above. (See Part II

herein for further discussion of Fifth Circuit inconsistency). Indeed, the Court of Appeals found that various discriminatory acts did not involve the same subject matter and thus failed under the three part test set forth above. In contrast, the Fifth Circuit in *Waltman v. International Paper Co.* found that the "subject" matter portion of the test was "undisputedly" satisfied because each of the acts involved sexual discrimination. 875 F.2d at 475. In the present case, it is unclear how the Court of Appeals reached its decision that the discrimination did not involve the same subject matter. As can clearly be concluded from the jury's verdict of willful age discrimination, the discriminatory acts were shown to be age related and directed at Layman and thus essentially involved the same subject matter.

The other Circuit Courts have not followed the Fifth Circuit's three part test to determine whether the "continuing violation" theory applies so as to extend limitations. Other Circuit Courts have looked to whether a discriminatory policy was in place and, if so, whether one discrete act of discrimination occurred during the limitations period. *McKenzie v. Sawyer,* 684 F.2d 62 (D.C. Cir. 1982); *Williams v. Owens-Illinois, Inc.,* 665 F.2d 918 (9th Cir. 1982); *Johnson v. General Electric,* 840 F.2d 132 (1st Cir. 1988); *Furr v. AT&T Technologies, Inc.,* 824 F.2d 1537 (10th Cir. 1987). The general rule, as stated in *Furr v. AT&T Technologies, Inc.,* is that a claim of age discrimination may be based on a continuing policy and practice of discrimination that began before the statutory filing period, as long as the employer continues to apply the discriminatory policy and practice to a point within the relevant filing period, and plaintiff is not merely complaining of the continuing effects of the discriminatory practice that existed only before the relevant filing period. 824 F.2d at 1543. Such an application is clearly consistent with the Supreme Court's decision in *United Airlines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d

571 (1977). In *Evans,* the Supreme Court made it clear that the continuing violations theory is inappropriate when the complaint consists merely of the effects of past discrimination that existed before the relevant filing period. The requirement of one specific act ensures that the discriminatory policy is still in place and one is not merely complaining of the effects of prior acts.

The rationale of looking for one discrete act of discrimination during the limitations period is supported by the fear of reprisals. "On occasion, even after notification of an adverse employment decision, an employee may be affected by a continuing policy maintained by the employer that may discriminate against the employee throughout his relationship with the employer." *Gray v. Phillips Petroleum Company,* 858 F.2d 610, 614 (10th Cir. 1988). A continuing discriminatory policy and practice may deter employees from filing a charge with the EEOC within the filing period because the employees may feel threatened by reprisals from the employer. *Id.* Recognizing this fear, the other Circuit Court's use their relatively straight forward test in applying the continuing violations theory. *Id.* at 614.

Obviously, the other Circuit Court's standard in applying the continuing violations theory to toll the limitations differs greatly from the Fifth Circuit's test both in terms of application and the anticipated result. Under the Fifth Circuit's test, discriminatory complaints could easily be dismissed even though a discriminatory policy existed and a discrete act occurs during the limitations period (See Part II herein). While the District Court and the Court of Appeals found that Layman failed to show that the continuing violations theory is applicable to the facts in the present case, the standard set forth in the other Circuit Courts would clearly allow Layman to assert a claim of discrimination because Xerox engaged in a continuing discriminatory policy and there existed discriminatory acts which occurred within the filing period.

This Court should review the standards under which a plaintiff may assert a continuing violations theory to toll the limitations period for purposes of bringing a discriminatory claim. The Fifth Circuit has repeatedly stated that its approach results in inconsistent holdings. Consequently, plaintiffs in the Fifth Circuit are left in the precarious position of being forced to assert discriminatory claims before they are certain a discriminatory policy exists. Adopting the test by the other Circuits would allow plaintiffs to adequately assess the employer's actions without fear their claims will lapse. By adopting the general rule applied by the majority of Circuit Courts this Court would be adopting a standard which is easy to apply and predictable in its outcome.

II. EVEN APPLYING THE FIFTH CIRCUIT'S TEST, THE COURT OF APPEALS ERRED IN HOLDING THAT LIMITATIONS WERE NOT TOLLED ON LAYMAN'S AGE DISCRIMINATION CLAIMS.

As mentioned above, the Fifth Circuit has had difficulty applying the continuing violation theory which arises "where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Waltman v. International Paper Co.*, 875 F.2d at 474 (quoting *Abrams v. Baylor College of Medicine*, 805 F.2d at 532). To establish a continuing violation, the plaintiff must show that at least one incident of the related discriminatory acts occurred within the limitations period. *Waltman v. International Paper Co.*, 875 F.2d at 474-475. The discriminatory acts shown by Layman include several acts within the 300-day period from July 16, 1986 to May 11, 1987.

The additional inquiry set forth by the Fifth Circuit in a continuing violation case is: (1) whether the alleged acts involve

the same type of discrimination, tending to connect them in a continuing violation; (2) whether the alleged acts are recurring versus isolated work assignments or employment decisions; and (3) Whether the acts have the degree of permanence which should trigger an employee's awareness of a duty to assert his or her rights. *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d at 981.

Layman clearly proved a series of age related discriminatory acts committed by Xerox, the nature of which only became apparent to Layman after time. Because of the nature of the acts and Xerox's deceitful conduct in this matter, none of the discriminatory acts were individually of a discrete nature so as to put Layman on notice that she should assert her rights. Indeed, much of the evidence of discrimination was not uncovered until discovery was completed in this case, including the grade levels, ages and salary of certain relevant Xerox employees.

The Court erroneously held that the continuing violation theory does not apply here because Layman's demotion and the denial of various jobs were such discrete and complete acts that they must be regarded as individual events. On the contrary, a persisting and continuing system of discriminatory practices related to promotions or transfer produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time. *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d at 1561. In *Glass v. Petro-Tex Chemical Corp.*, as in the instant case, the plaintiff's suspicions of discrimination were not tantamount to knowledge of actual intentional discrimination. *Id.* at 1562. A reasonably prudent employee, one who is reasonably ambitious, conscientious and trusting will not necessarily conclude that her employer is an illegal discriminator on the basis of hearsay information and acts that are arguably non-discriminatory. *Id.* The plaintiff is just as likely as not to give her employer the benefit of the doubt and, in doing so, strive to disconfirm her suspicions. *Id.*

The facts in *Glass v. Petro-Tex Chemical Corp.* are strongly analogous to Layman's circumstances at Xerox. Glass was hired by Petro-Tex as a payroll clerk in 1967, based on eight years of highly recommended experience. 757 F.2d at 1557. From 1967 to 1974, Glass received merit raises and was regarded as a conscientious well-qualified employee, performing her responsibilities with initiative and dedication. *Id.* Glass' ambition to be promoted to payroll manager was well-known, but Glass was not promoted to the position on the three separate occasions the position became vacant during her employment. *Id.* When Glass expressed the view that the failure to consider her for a promotion was discriminatory, her working conditions were made so intolerable that she resigned. *Id.* Under the circumstances of Glass being passed over for promotion on three distinct occasions with the positions being filled by less qualified males, the court held that Glass did not have actual knowledge that she had been discriminated against in 1969 (the first vacancy) until she was passed over for promotion on the third occasion in May of 1974. *Id.* at 1562. The rationale for all of the equitable tolling theories is that it is unfair to allow the defendant to conceal facts or provide artificial information concerning a discriminatory act which would support the plaintiff's cause of action and then to rely on the statute of limitations to bar the suit when a duly diligent plaintiff has been unable to discover those facts. *Chappel v. Emco Machine Works Co.*, 601 F.2d 1295, 1303 (5th Cir. 1979); *Glass v. Petro-Tex Chemical Corp.*, 757 F.2d at 1561-1562.

Like the plaintiff in *Glass v. Petro-Tex Chemical Corp.*, Layman did not know and could not reasonably have been expected to have realized that the early discrimination related to Layman's demotion and the denial of the Manager of Software Marketing position awarded to Joan Bigham in 1984 were actionable, despite any "suspicions" she may have had, particularly in light of Xerox's efforts to keep relevant information

from her. 757 F.2d at 1562. Layman is just the type of reasonably prudent employee, discussed by the court in *Glass,* who is also ambitious, conscientious, trusting and willing to give her employer the benefit of the doubt based upon Xerox's representations to her. Indeed, Layman's investigation of Bigham's position led only to information that Bigham's responsibilities were less than those Layman had held when she had the similar management position. And, despite the fact that Layman inquired into her demotion from her former position and the "elimination" of the position, David Kearns gave Layman false information in response to her inquiry. Layman did not learn the facts related to Joan Bigham and the Manager of Software Marketing position, including Bigham's grade and salary until discovery in this lawsuit. Xerox took an active role in misleading Layman, and cannot rely on the statute of limitations to bar the suit when Layman, though duly diligent, was unable to discover the necessary facts.

Where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts, the violation is a continuing one that relieves the plaintiff making the claim from the burden of proving that the entire violation occurred within the actionable period. *Abrams v. Baylor College of Medicine,* 805 F.2d at 532. Where the employer's ambiguous acts are such as to obscure the existence of the unlawful practice, thus failing to alert the average lay person to act to protect his rights, a continuing violation is established. *Id.* at 533. *In Abrams v. Baylor College of Medicine,* a continuing violation was established where the plaintiffs were informed they were ineligible for rotation into a medical program in Saudi Arabia because of their Jewish religion. *Id.* at 534. The discriminatory practices were first applied to each of the two plaintiff doctors almost immediately upon their employment (1978 for Dr. Abrams and 1979 for Dr. Linde). *Id.* at 531. Baylor asserted that a continuing violation did not exist and that

a discrete act was committed when each of the plaintiffs was first informed they were ineligible for the rotation. *Id.* at 534. The court, however, found a continuing violation where the plaintiffs persisted in seeking eligibility for rotation, and Baylor denied each request, failing to resolve the alleged "visa problem" in Saudi Arabia. *Id.* at 534. The college continued in its exclusionary practices towards the plaintiffs into the limitations period. *Id.*

Xerox's discriminatory practices towards Layman clearly extended into the 300 day limitations period (July 16, 1986 - May 11, 1987). These acts include Wilson's instructions in August 1986 to Patrick that Layman should not be approved for travel, though younger organization members had no such restrictions; Wilson's exclusion of Layman from staff meetings in 1986 and 1987; the removal of materials and furniture from her office in the fall of 1986 and early 1987; the cancelling of her Intelnet card in January 1987; Wilson's refusal to provide Layman with documentation necessary to complete projects for Spelhaug in March 1987; and all the activities related to Xerox's prevention of Layman's relocation to El Segundo from October 1986 through and beyond May 1987.

Layman's factual circumstances clearly meet the *Berry* test. First, the discriminatory actions outlined above were taken by Xerox personnel and are related to Layman's harassment by younger personnel and the fact that younger personnel were given preferential treatment and positions over Layman. (See *Waltman v. International Paper,* 875 F.2d 468). Secondly, the incidents of discrimination were recurring and not isolated. Finally, the acts were not sufficiently permanent under the circumstances that they alerted Layman of a duty to assert her rights prior to 1987.

III. THE COURT OF APPEALS ERRED IN ITS FINDING THAT LAYMAN WAS NOT ENTITLED TO BASE HER CLAIM OF FRAUD ON XEROX'S MISREPRESENTATION OF NO AVAILABLE DALLAS JOBS.

In its review of the record and determination that there was no substantial evidence to support Layman's fraud claim, the District Court held that "Layman's fraud claim must stand or fall on the basis of the evidence of representations made by Knight in 1986, related actions taken by Layman and Xerox subsequent to these representations, and inferences reasonably drawn from that evidence." The District Court states that the Pretrial Order does not support the evidence adduced at trial related to the representation made by Xerox that Layman's group needed to relocate to California because there would be no jobs for the group in Dallas. The Court of Appeals erred in affirming the District Court's decision to preclude this claim from its consideration of Xerox's JNOV motion. Implicit in both these Courts' holdings is that if such evidence was not precluded, there would be sufficient evidence to support Layman's fraud claim and the JNOV Motion would necessarily be denied.

Layman's Second Amended Complaint and the Pretrial Order fully support the proof adduced at trial in this regard. In her Second Amended Complaint, Layman's fraud claim states:

> Plaintiff would show that Defendant made intentional misrepresentations of fact with the intent of inducing Plaintiff to contract for employment in California....

The amended Pretrial Order provides in §4A(3), under the heading of "Plaintiff's Claims":

...Plaintiff further claims that Defendant has made intentional misrepresentations of material facts to Plaintiff with the intent of inducing her to relocate for employment in California....

Under §6 of the Pretrial Order, in the listing of contested issues of fact, the following were included:

> (25) Whether in October 1986, through March 1987 Elizabeth Layman received a job offer within Xerox Corporation;
>
> (26) Whether from October 1986, through March 1987 Elizabeth Layman received a job offer within Xerox Corporation requiring a relocation to El Segundo, California;
>
> (69) Whether Jim Brown refused to provide the organizational charts of the competency center (labs) to Elizabeth Layman;
>
> (70) Whether Eva Sage refused to provide Elizabeth Layman with the organizational charts of the competency center (labs);
>
> (71) Whether Eva Sage had been instructed by Jim Brown not to provide any information on the competency center (labs) to Elizabeth Layman.

The testimony and documentary evidence, set forth above that the representation that there were no jobs existing in Dallas for Layman or members of her group was a part of the "intentional misrepresentations of material facts to Plaintiff,"

made "with the intent of inducing her to relocate for employment in California" pled by Layman. It is apparent from the evidence and from a reading of Layman's pleadings and the pretrial order as a whole that the "no Dallas jobs" representation is not a separate cause of action.

In *Randolph County v. Alabama Power Co.*, 784 F.2d 1067, (11th Cir. 1986), *cert. denied*, 479 U.S. 1032, 107 S.Ct. 878, 93 L.Ed.2d 832 (1987) cited by the District Court in its Opinion, it was held that the exclusion of factual allegations not set forth in the pretrial order was proper. *Id.* at 1072. However, in that case, the plaintiff pled four specific factual misrepresentations made by the defendant and failed to include them in the pretrial order. In *Flannery v. Carrol*, 676 F.2d 126 (5th Cir. 1982), cited by the Court of Appeals in its Opinion, it was held that the exclusion from the pretrial order of any reference to the Texas act, where it stated in two places that the claim was brought under the federal, precluded plaintiff from asserting a claim under the Texas act. Both such cases are distinctly different from the present case. Layman's broad pleading of misrepresentation clearly includes the disputed issues of fact in the Pretrial Order, including Xerox's refusal to provide her with information concerning the jobs in Dallas. A pretrial order should be legally construed to permit any issues at trial that are embraced within its language. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 368 (9th Cir. 1985). Where the pretrial order puts a general issue into contention and testimony is presented thereon by the parties, the issue is properly considered by the court. *Id.* at 368-369.

Layman's evidence concerning the "no Dallas jobs" representation which was made as a part of and in conjunction with the representations which induced her to commit to relocation in El Segundo was properly before the Court and supports the verdict on her fraud claim. Even without the "no Dallas jobs" evidence, however, there is substantial evidence to support the jury's findings on Layman's fraud claim, as demonstrated below.

IV. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S APPLICATION OF THE RULES FOR ENTRY OF JUDGMENT NOTWITHSTANDING THE VERDICT TO THE FACTS SUPPORTING LAYMAN'S FRAUD CLAIM.

The Court of Appeals erred in affirming the District Court's application of the standard for the granting of a Motion For Judgment Notwithstanding The Verdict. On motions for judgment notwithstanding the verdict, the court is to consider all the evidence, not just the evidence supporting the non-mover's case. *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc). However, the evidence is to be considered in the light and with all reasonable inferences most favorable to the party opposing the motion. *Id.* (emphasis supplied). If there is substantial evidence opposed to the motion, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion for judgment notwithstanding the verdict should be denied. *Id.* A motion for judgment notwithstanding the verdict should not be decided by which side has the better of the case. *Id.* at 374-375 (emphasis supplied). It is the function of the jury, the traditional trier of facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses. *Id.* at 375 (emphasis supplied). A judgment notwithstanding the verdict is to be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. *Id.* at 374. Credibility is also a question for the jury. *Boyle v. Pool Offshore Co.,* 893 F.2d 713, 715 (5th Cir. 1990). The court considers the quantum of evidence that was presented, leaving credibility questions for the jury. *Id.* at 717 (citing *Boeing Co. v. Shipman,* 411 F.2d at

375). Where it is clear from the record that each side presented substantial evidence in support of its case, and the jury reasonably could have rendered its verdict for either side, the court is not to take away the jury's verdict. *Id.*

In its review of the evidence related to Layman's fraud claim, the Court erred in weighing the evidence presented, in failing to consider all of the evidence presented, and in failing to consider the evidence in the light and with all reasonable inferences favorable to Layman. To recover on her fraud claim, Layman was required to prove:

(1) a material representation was made;

(2) it was false;

(3) the speaker knew it was false when made or made it recklessly without any knowledge of its truth as a positive assertion;

(4) that he made it with the intention that it should be acted upon by the relying party;

(5) that the party acted in reliance upon it; and

(6) that the relying party thereby suffered injury.

Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983); *New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.,* 703 S.W.2d 209, 213 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). An agreement to take some future action made with the intent that the obligation will not be performed in order to deceive another person is actionable fraud. *Spoljaric v. Percival Tours, Inc.,* 708 S.W.2d 432, 434 (Tex. 1986); *New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.,* 703 S.W.2d 209,

214 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.). While the party's intent is determined at the time the party made the representation, that intent may be inferred from a party's subsequent acts. *Spoljaric* at 432; *New Process Steel* at 214. An expression of opinion as to the happening of a future event may also constitute fraud where the speaker purports to have special knowledge of facts that will occur or exist in the future. *Trenholm* at 930. An action for fraud may also be maintained where opinion is based on past or present facts. *Trenholm* at 930. Where direct representations of present fact are so intertwined with future prediction that the entire statement amounts to a misrepresentation of facts, fraud is established. *Trenholm* at 931.

The record is replete with evidence supporting Layman's fraud claim. The representations include the "fact" that no jobs were available in Dallas, promises of a guaranteed job in California, a specifically described job for Layman, guaranteed benefits, incentives and expenses regarding relocations, and that relocation would be complete by April 1987. Xerox continuously reaffirmed its relocation promises to Layman, when it knew their falsity.

On October 7, 1986, Xerox presented to selected Dallas employees the particulars of Xerox's reorganization and solicited these employees, including Layman, to accept relocation to California. The employees at this meeting were told that jobs were not available in Dallas for Layman's group because all the marketing jobs were to be consolidated in California. At this meeting, Robert Knight promised that anyone accepting the relocation would be guaranteed a marketing job in his organization in California. This was followed by written confirmation from Jim Brown on October 15, 1986. In April 1987, Joan Bigham reaffirmed Layman's guaranteed job in California.

Jim Brown, Eva Sage and Ken Larsen represented that all relocations to California would be completed by April 1987.

Again, Brown reaffirmed the promise on October 15, 1986 in his written communication packages to affected employees, including Layman.

On October 7, 1986, Brown, Sage and Larsen verbally guaranteed that benefits, incentives and expenses would be paid to all employees who accepted relocation. This guarantee was made again, in writing, in October 1986.

On November 10, 1986, Layman accepted in writing the relocation to California, conditioned that her current or a comparable job was available to her in El Segundo. Layman was instructed by Sage as Personnel Coordinator, to complete the relocation authorization form and obtain the signature of her manager, Bigham. Layman completed the form and had Bigham sign the form on November 21, 1986.

Xerox continuously made misrepresentations and reaffirmed prior misrepresentations orally, in writing and by corporate action. In October 1986, Wilson sent Layman a relocation package including information on Xerox's purchase of her home. Both Sage and Bill McKissock informed Layman she was expected to be in California five days a week, beginning January 1, 1987. Because of the misrepresentations, Layman immediately made arrangements for the storage of her belongings and the sale of her Dallas home, to her detriment. In November 1986, Sage made arrangements for Layman to meet with Merrill-Lynch concerning the purchase of her home. Xerox purchased Layman's home through Merrill-Lynch Relocation Services in January 1987. In February 1987, Sage assured Layman that Layman was working for McKissock and the relocation was proceeding according to plan. Bigham assured Layman of the same thing in April 1987.

From October 1986 to April 1987, Xerox intentionally kept information from Layman regarding the jobs which were available in Dallas, which jobs were comparable to her current position and for which she was clearly qualified. Sage, Bigham,

Wilson and Brown all participated in the representations and withholding of information.

On November 20, 1986 Lou Hocker, in a memo to Nickerson with a copy to Sage, stated that he had knowledge concerning openings in the Dallas area during the relocation. Bigham also acknowledged that she had information concerning jobs available in Dallas during this period, in her memo to Knight on December 1, 1986. Sage apparently knew of Dallas jobs when she signed Layman's relocation authorization, and Sage testified that Brown had told her not to provide Layman with information on jobs in Dallas during this time period. Brown's organization in the Dallas area (Lewisville) was formed between October 1986 and December 1986 and formally announced in January 1987. This organization contained several positions for which Layman was qualified.

Xerox's fraudulent representations were continuous and well documented. The trial testimony of Layman and Xerox's representatives and the documentary evidence clearly establishes the basis for her fraud claim. The gist of fraud is deception as to an existing fact, namely, the state of the promisor's mind. *Turner v. Briscoe,* 171 S.W.2d 118, 119 (Tex. Comm'n. App. 1943, judgment adopted). Xerox's continuing actions towards Layman were nothing more than a pretense of performance, and the jury rightfully inferred that each act undertaken towards Layman concerning her purported relocation supports a finding of misrepresentation.

The Court of Appeals recites two reasons for affirming the District Court's granting of Xerox's Motion Notwithstanding The Verdict on Layman's fraud claim. First, it states that there is no substantial evidence in the record to support her claim that Xerox promised Layman a specific job. The Court of Appeals states that while the jury was entitled to infer from Layman's testimony that she was willing to relocate only to her current or comparable job, the record does not support the inference that

Xerox promised Layman such a job. The Court of Appeals bases this holding on its examination of the evidence and conclusion that the only evidence of such a promise is Layman's November 10, 1986 memo "in which Layman - not Xerox - placed qualifications on relocation." Thus, the Court of Appeals disregarded Layman's testimony regarding the offer of the job.

The second reason cited by the Court of Appeals is the question of intent. The Court of Appeals concluded that the evidence produced at trial demonstrates Layman was offered a job on two occasions, that Xerox authorized Layman to relocate and undertook several steps integral to her relocating. The Court of Appeals states that the jury had no basis to ignore the existence of this evidence or to conclude Xerox had no intent to find employment for Layman in El Segundo, and that Layman's subjective objections to the job offers provide no predicate for a finding that Xerox never intended to perform its promise to provide her a job with Xerox in California.

A. Promise of a Specific Job

In reaching its conclusions regarding the lack of substantial evidence of the promise of a specific job, the Court of Appeals ignores the relevant portion of the testimony of Eva Sage, Xerox's representative. Ms. Sage testified that Xerox signed Layman's relocation authorization after receiving Layman's letter qualifying her relocation acceptance, dated November 10, 1986. Sage testified that Layman required a job that was equivalent to her "current or comparable" job and that Xerox could not fulfill this by offering her a "generic job." She must have had a job "at her current grade with an opportunity to be higher," and that these requirements caused Sage to devote a great deal of time to Layman's job search. Sage's testimony, as Xerox's representative certainly meets the substantial evidence requirement of *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir.

1969). Based upon this testimony (and the testimony of Layman considered by the Court) the jury was entitled to decide that Xerox agreed to provide Layman with a current or comparable position. Substantial evidence, while something less than the weight of the evidence, is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence. *Gibraltar Savings v. LDBrinkman Corp.*, 860 F.2d 1275, 1297 (5th Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 2432, 104 L.Ed.2d 988, (1989). And, where there is substantial evidence opposing the motion for judgment notwithstanding the verdict, of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion for judgment notwithstanding the verdict should be denied. *Id.* In this case, the jury performed its function as the trier of facts, weighing the evidence and inferences and determining the credibility of the witnesses, and the court is not to usurp this function. *Id.* at 375. Where it is clear from the record that each side presented substantial evidence in support of its case, the court is not to take away the jury's verdict. *Boyle v. Pool Offshore Co.*, 893 F.2d 713, 715 (5th Cir. 1990) (citing *Boeing v. Shipman*, 411 F.2d at 375).

B. The Intent Issue

With regards to the intent issue, the District Court erred in substituting its own judgment for that of the jury. In reviewing the District Court's decision, the Court of Appeals further errs by reviewing the evidence in the light most favorable to Xerox, instead of the light most favorable to Layman. The jury certainly had the right to disbelieve Xerox's explanations concerning the alleged "job offers" in El Segundo. Xerox pursued a course of deceitful conduct, knowing Layman was acting in reliance upon its representations (both verbal and

written), to Layman's severe detriment. Xerox made enumerable promises, including promises of jobs to begin on specific dates but continually put Layman off and failed to follow through with real offers or the means whereby Layman could review or accept any position in California. The jury had every right to infer from Xerox's actions that Xerox's continual broken promises and misrepresentations to Layman were evidence of its fraudulent intent concerning her transfer.

Contrary to the Court of Appeals' conclusions, the evidence clearly supports the finding that Xerox never intended to perform its promise to provide Layman a job in California. Larry Spelhaug testified that his April 1987 oral "job offer" was an offer of a job which would expire by the end of 1987. Although Spelhaug claims personnel conveyed the written "offer," Xerox could produce no documentary evidence that the job offer was ever conveyed to Layman, though it claimed such documentation existed. When part of the alleged "job offer" was read over the phone to Layman by Spelhaug, it was not a job offer to Layman, but was a purported job description to be sent from Spelhaug to Owen Brown. The description was not of a real, permanent job, and was not an offer directed to her for acceptance.

Any argument that the second purported job offer evidenced Xerox's performance of its promise, or negates its fraudulent intent cannot withstand scrutiny. The Court of Appeals reviewed the evidence related to the second "job offer" and determined that the jury had no basis to ignore the existence of evidence of the "offers" or to conclude that Xerox had no intent to find employment for Layman in El Segundo. In drawing such conclusions, the Court is, in direct opposition to the *Boeing* standards deciding for itself "which side has the better of the case". *Boeing v. Shipman* at 374-375. Contrary to the Court's interpretation of the evidence, the actual sequence of events, demonstrated in the record shows:

(1) On July 22, 1987, Xerox employee Larry Spelhaug telephoned Layman, informing her that Xerox had an offer it needed to "run by her". The telephone conversation was recorded by Layman. This offer was made after the relocation period ended in April 1987. And the "offer" was made after Layman filed suit.

(2) On July 28, 1987, Layman sends an internal memo to Larry Spelhaug informing him that she has not received the letter containing the offer he described in the July 22, 1987 phone conversation, and that she needed time to evaluate it upon receipt. Layman states she will be unable to respond by August 1 and would appreciate facilitation of the delivery of the letter.

(3) Layman receives the position offer August 10, 1987. However, no description was attached. There was no evidence adduced at trial that Layman was given a deadline to respond.

(4) On August 12, 1987, Layman sends an internal memo to Spelhaug informing him that her vacation (which she had postponed from December 1986 when she was awaiting relocation) begins next week and she will not be back in Lewisville until late September.

(5) On August 17, 1987, Allan Ayars sends an internal memo to Eva Sage withdrawing the offer to Layman.

(6) Sage testifies at trial that there is no documentary evidence (such as a cover letter or certified mail green card) to evidence the delivery of the July 13, 1987 position offer to Layman. No such documentation was introduced at trial.

(7) On September 26, 1987, Layman writes to Jack Kravitz informing him she never received the original offer letter, nor any job description but finally obtained a copy of the letter from Allan Ayars. Layman declines the offer.

The Court of Appeals further ignores the fact that both Eva Sage and Bill McKissock of Xerox informed Layman she was expected to be in California five days a week, beginning January 1, 1987. Because of these misrepresentations, Layman immediately made arrangements for the storage of her belongings and the sale of her Dallas home. When this transfer failed to materialize, in February of 1987 Sage assured Layman that Layman was working for McKissock and that relocation was proceeding according to plan. Bigham assured Layman the same thing in April 1987. The jury was certainly entitled to infer from Xerox's continual broken promises that it never really intended to go forward with the California transfer. Again, without question, the evidence concerning "job offers" meets the standard for substantial evidence set forth in *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

The Court of Appeals, rather than making the proper determination of the conflict in the substantial evidence between the parties, weighs the evidence and decides that it agrees with Xerox's version of the facts, despite Xerox's inability to document its position. The Court of Appeals failed to even consider all the evidence presented by Layman, and most certainly failed to consider the evidence in the light and with all reasonable inferences most favorable to Layman. Layman's substantial evidence clearly provides a strong basis for the jury's verdict on her fraud claim.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1860

ELIZABETH LAYMAN,

Plaintiff-Counter,
Defendant-Appellant,

versus

XEROX CORPORATION,

Defendant-Counter,
Plaintiff-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(CA3-87-1733-D)

(July 1, 1991)

Before JOLLY and DUHE, Circuit Judges, and WALTER*, District Judge.

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*District Judge of Western District of Louisiana, sitting by designation.

PER CURIAM:**

Elizabeth Layman brought suit against her employer, Xerox Corporation, alleging, inter alia, age discrimination in violation of the Age Discrimination in Employment Act (''ADEA''), 29 U.S.C. §§ 621-634, sex-based discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and a pendent state law claim for fraudulent misrepresentation.

After trial, a jury awarded Layman compensatory damages on her ADEA claim and both compensatory and punitive damages on her fraud claim amounting in toto to over $9 million. The district court, however, pursuant to a well considered and thorough opinion that we cannot improve upon, entered a judgment notwithstanding the verdict (''JNOV'') on Layman's ADEA and fraud claims because of the insufficiency of the evidence and rejected outright her sex-based discrimination claim. On appeal, Layman argues that the district court erred in entering the JNOV and in barring all of her discrimination claims arising prior to the 300-day EEOC filing period. We affirm.

**Local Rule 47.5 provides: ''The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.'' Pursuant to that Rule, the court has determined that this opinion should not be published.

I

Layman was initially employed by Xerox as an Engineering Specialist in 1980. In November 1982, she was named Software Marketing Manager. A year later, she was assigned to the position of Manager of Business Development. She was dissatisfied with this new assignment because it apparently resulted in a downgrade in her job level although not in a lower salary. She used Xerox's open-door grievance procedure to complain of this alleged discriminatory treatment as well as three other unrelated matters. Layman's complaints were addressed by David Kearns, president of Xerox, who told her that he was satisfied that Layman had not been treated differently from other employees. Eventually, Layman accepted a position as Marketing Program Manager.

In 1986, Xerox decided to eliminate its software business and to consolidate its marketing functions in California under the management of Robert Knight, a vice president. At a meeting, Knight informed a group of approximately thirty employees, including Layman, whose jobs in Dallas were being either transferred or eliminated because of the consolidation, that the company would find a position for anyone who agreed to relocate to El Segundo, California. The company made no express promises as to the specifics or comparability of the jobs available in California. Indeed, in a package of written materials provided to these employees, Xerox warned, "There may be some cases where the only available position is lower than current grade level."

In October, Xerox invited all employees possibly interested in relocating to California to travel to El Segundo at the company's expense to view the area and to meet real estate brokers. Layman accepted the invitation.

In November, Layman began applying to Texas law schools. Four days later, Layman wrote a letter to Xerox stating, "I am willing to relocate to El Segundo during 1987 under the relocation plan presented to us providing my current or a comparable job is available to me in El Segundo." A week later, Eva Sage, the personnel manager responsible for relocating Layman's group, told Layman over the telephone that the company could not guarantee that her new job in California would be equal or comparable to her existing position. The content of this conversation was verified by Layman's own handwritten notes.

In December 1986, Layman met with Bill McKissock in El Segundo at Xerox's expense to interview for a potential position to begin in January 1987. The position, however, never materialized because McKissock did not receive final approval to set up the department he had proposed. On January 23, 1987, Xerox purchased Layman's house in Dallas pursuant to the company's relocation agreement.

In March 1987, Layman once again travelled to California at Xerox's expense to discuss possible jobs. In April, Layman spoke with Larry Spelhaug over the telephone concerning a specific position in California. Spelhaug read to Layman a memorandum describing the position and informed Layman that she was being offered the job at a 5% salary increase.

Layman told Spelhaug that the offer was unacceptable because she viewed the position, although comparable in grade to her previous job, as only temporary. The memorandum, however, stated that "[u]ntil assigned to your next position, it is anticipated that the end of life stratagy [sic] development will continue until the forth [sic] quarter."

In April, Layman was accepted as a student at St. Mary's University School of Law in San Antonio, Texas, for the 1987 fall semester. In June, Layman bought a house in San Antonio, but failed to inform Xerox either of her enrollment in law school or her decision to move to San Antonio. Unaware of these actions, Xerox continued to pay Layman her full salary.

On July 22, Spelhaug telephoned Layman about another position in California. The position, entitled Desktop Publishing Markets Manager, provided for the same job level and a 5% increase in salary. He agreed to give Layman until the first of August to consider the offer. However, because of Layman's change in address, she did not receive a written copy of the proposal until August 10th. On September 26, Layman sent a memorandum declining the position and requesting advice regarding the procedure for salary continuance. On March 4, 1988, Layman officially ended her employment at Xerox with an exit interview.

II

On May 11, 1987, Layman filed a charge of discrimination with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission ("EEOC"). The EEOC

issued a right to sue letter on August 26, 1988. Layman then filed this action based on age and sex-based discrimination in violation, respectively, of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. She also alleged state law fraud and numerous other state law claims. Xerox counterclaimed on a common-law fraud theory. Prior to trial, the district court granted summary judgment in favor of Xerox on all of Layman's claims except those brought pursuant to the ADEA and Title VII and her pendent state claims for fraud and breach of duty of good faith and fair dealing. All of Layman's claims except her Title VII claim were tried to a jury. The Title VII claim was tried simultaneously to the court. The trial judge granted a directed verdict in favor of Xerox on the breach of duty claim. Thus, with the exception of the sex-based discrimination claim, Layman's remaining claims, as well as Xerox's counterclaim, were submitted to the jury.

The jury returned its verdict against Xerox on its fraud claim and awarded Layman $145,000 in actual damages on her ADEA claim, and $139,716 in compensatory damages and $8,750,000 in punitive damages on her fraud claim. Xerox moved for a JNOV or, in the alternative, for a new trial. The trial court granted the JNOV, stating that the statute of limitations had run on all of Layman's claims arising out of incidents occurring prior to July 16, 1986, that Layman was not entitled to rely on her claim that Xerox misrepresented the availability of jobs in Dallas because the allegation was not included in the court's

pretrial order, and, finally, that the evidence was insufficient to support the jury's verdict on Layman's age discrimination and fraud claims. Moreover, the district court entered judgment for Xerox on Layman's Title VII claim, stating that there was no evidence establishing sex-based discrimination. On a renewed motion for a ruling on Xerox's new trial motion, the trial court conditionally granted the motion, stating that a new trial should be granted in the event that this court reverses its JNOV but that, in any event, a new trial should not be granted on Xerox's counterclaim. Layman filed a timely notice of appeal.

III

A

In order to sustain an ADEA claim in deferral states,[1] such as Texas, an aggrieved party must file a charge of discrimination with the EEOC within 300 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(2). Layman filed her EEOC charge of discrimination on May 11, 1987, or approximately three years after the first alleged incident of age discrimination. The district court thus determined that any claims arising

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[1] Under the ADEA, a charge of discrimination must be filed with the EEOC within 180 days if the unlawful employment practice occurred in a non-deferral state or 300 days if it occurred in a deferral state. See 29 U.S.C. § 626(d). A deferral state is one in which (1) a state law prohibiting discrimination in employment is in effect and (2) a state authority has been set up to grant or seek relief from such discriminatory practice. See Clark v. Resistoflex Co., 854 F.2d 762, 765 n.1 (5th Cir. 1988).

prior to July 16, 1986, could not be considered in support of the jury's verdict on Layman's ADEA claim, since none of the equitable exceptions applied to toll the 300-day filing period. Layman argues on appeal that the district court erred in holding that the filing period was not tolled because Xerox engaged in a continuing discriminatory policy. We disagree.

A continuing violation arises where "the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (quoting Abrams v. Baylor College of Medicine, 805 F.2d 528, 532 (5th Cir. 1986)). In determining whether a plaintiff is entitled to rely on a continuing violation theory, we have considered the following three factors: (1) subject matter; (2) frequency; and (3) permanence. Id. at 475. In applying these factors to the facts of this case, the district court concluded that several of Xerox's alleged discriminatory acts, such as demoting Layman and denying her jobs, had a quality of permanence about them which prevented their being viewed as only part of a continuing violation. With regard to Layman's more ambiguous complaints, such as the company's removal of her office furniture and its cancellation of her telephone card, the district court determined that these acts did not involve the same subject matter and that, moreover, they occurred only sporadically.

We agree with the district court's well-articulated analysis and resolution of the limitations issue presented in this case. We thus affirm its decision that Xerox's alleged discrimination was

not a continuing violation and that any acts occurring before July 16, 1986, could not be considered in support of the jury's verdict on Layman's ADEA claim.

B

Layman argues that the district court erred in granting a JNOV on her fraud and ADEA claims. In reviewing the trial court's decision on Xerox's JNOV motion, we use the same standard as the trial court used in passing on the motion in the first instance. In other words, we consider all the evidence in the light and with all reasonable inferences most favorable to Layman. Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). A JNOV is proper in this case only if the facts and inferences point so overwhelmingly in favor of Xerox that reasonable persons could not arrive at a contrary verdict. See id. at 375 n.16.

1

Layman argues that the evidence presented at trial sufficiently supports the jury's verdict in her favor on her fraud claim. To recover on this claim under Texas law, Layman had to show (1) that Xerox made a false material misrepresentation; (2) that Xerox knew it was false when it made it or that Xerox made it recklessly without any knowledge of its truth of falsity; (3) that Xerox made the representation with the intent that Layman should act on it; (4) that Layman acted in reliance upon the representation; and (5) that Layman thereby suffered injury. See Trenholm. v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983).

The trial court determined as a threshold matter that the sole

support for Layman's fraud claim was Knight's representation to Layman and other employees that Xerox would find a position for anyone who agreed to relocate to California. At trial, Layman, however, also produced evidence related to Xerox's affirmative representation that there were no jobs available for Layman's group in Dallas. Apparently, documentary evidence indicated that there were indeed jobs existing in Dallas at the time this representation was made. The trial judge, however, refused to allow Layman to pursue this theory of fraud because the allegation was not included in the court's amended pretrial order. Although the pretrial order contained a general fraud allegation, the district court determined that the contention was not broad enough to encompass this specific allegation.

We find no abuse of discretion in the district court's decision to preclude this claim from its consideration of Xerox's JNOV motion. Layman was bound by the pretrial order, which, according to the district court, did not provide sufficient notice to Xerox to prepare a proper defense to this allegation. See Flannery v. Carroll, 676 F.2d 126, 129-30 (5th Cir. 1982). We will not disturb the district court's holding in this regard.

Having settled that issue, we must now determine whether there was ample evidence to support the jury's findings on Layman's fraud claim in the absence of any evidence regarding Xerox's alleged misrepresentation about the availability of jobs in Dallas. The district court cited two reasons for granting Xerox's motion for JNOV. First, the evidence at trial did not support the inference that Xerox promised Layman a position in

California comparable to her existing grade level. Second, the evidence did not support a finding that Xerox never intended to perform its agreement to relocate Layman.

In response to the district court's first reason, Layman argues that the testimony of Sage, Xerox's personnel manager in charge of Layman's group, amply supports the jury's conclusion that Xerox promised her a specific job. Sage testified at trial that Xerox authorized Layman's relocation after receiving Layman's letter qualifying her acceptance upon the condition that she receive a position equivalent to her current job.

We note, however, that Sage also testified at trial that she did not guarantee Layman a specific job. Indeed, even Layman's handwritten notes transcribed after a telephone conversation with Sage indicate that she understood that the company had rejected her condition. Thus, we agree with the district court that the only evidence in the record, including the written materials provided to Layman's group expressly stating that some positions in California would be lower than the current grade level, shows that Xerox reserved the right to reduce Layman's grade level if it became necessary. There is simply no evidence of any weight supporting the jury's finding that Xerox made a false promise to Layman.

In response to the district court's second reason for granting Xerox's JNOV motion, Layman argues that the jury was entitled to infer from Xerox's continual broken promises that it never really intended to transfer her to California. Layman includes Xerox's two jobs offers among these broken promises. She

complains that the first alleged job offer created a position that ended by its own terms in 1987 and was thus not an offer for a real, permanent job. She further insists that the second offer should not be considered as evidence of Xerox's intent to relocate her because, inter alia, it was made after she filed suit and did not contain a proper job description.

We agree with the district court, however, that the alleged broken promises by Xerox in this case do not evidence any fraudulent intent to induce Layman to move to California. Notwithstanding any deficiencies in the jobs offers themselves, it is undisputed that the offers were made and that they were rejected by Layman. These two jobs offers are wholly inconsistent with the theory that Xerox did not intend to relocate Layman, and, for that matter, so are Xerox's agreement to purchase Layman's house at a loss, to fly Layman to California on three separate occasions, initially in order to help her decide whether to relocate and later in order to help her decide whether to accept certain job offers, and finally, to continue to pay Layman's full salary during her relocation. In short, the record in this case is overwhelmingly contrary to the jury's finding that Xerox intended to defraud Layman. The district court, therefore, did not err in granting Xerox's JNOV motion on Layman's fraud claim.

2

In granting Xerox's motion for JNOV on Layman's age discrimination claim, the trial court divided Layman's claims into two possible categories: (1) harassment and (2) the denial

of a job. Layman argues that the district court erred in categorizing her claims in this manner because her complaint alleged a constructive discharge claim, rather than an harassment claim. She also argues that the court erred in holding, first, that she failed to prove a prima facie case of age discrimination and, second, that, in any event, she failed to show that the reasons proffered by Xerox in defense of its actions were pretextual.

We need not consider the merits of Layman's constructive discharge claim, however, because we hold that this claim is barred for two reasons. First, she waived any constructive discharge claim by failing either to submit the issue to the jury or to object to its omission. Fed. R. Civ. P. 49(a). Second, because she never included the claim in her EEOC charge, the claim is barred by the 300-day limitations period. 29 U.S.C. § 626(d)(2); Clark v. Resistoflex Co., 854 F.2d 762, 765 (5th Cir. 1988).

We now turn to Layman's second ADEA claim. This claim arises solely from Xerox's decision to offer a job in Dallas to Layman's co-employee, Wendell Wilson. Wilson was one of the employees at Xerox whose jobs either were being eliminated or transferred to California. The company, however, offered Wilson a position in the company's newly-formed Technical Competency Center in Dallas. According to Layman, Xerox lied to her about the availability of this job in Dallas in order to induce her to relocate to California and to avoid having to consider her for the position ultimately given to Wilson, who is approximately 5 years younger than Layman.

In order to establish a prima facie case of discrimination, Layman had to show that she was a member of a protected class or, in other words, that she was at least 40 but less than 70 years old, that she was qualified for the job in question, and that an employee outside of the protected class received the job instead. Laurence v. Chevron, U.S.A., Inc., 885 F.2d 280, 283 (5th Cir. 1989). The district court concluded that Layman had not established a prima facie case of discrimination because she failed to offer any evidence either establishing what qualifications the job required or concerning her own qualifications for the job other than her own testimony. We need not decide this issue, however, because we agree with the district court's alternative holding that Layman failed to provide sufficient evidence on which a reasonable trier of fact could find that Xerox's proffered reasons for failing to offer her the job given to Wilson were pretextual.

For purposes of our discussion, therefore, we will assume that Layman established a prima facie case and that she succeeded in creating a rebuttable presumption of intentional discrimination. Thus, the burden of production shifted to Xerox to articulate some legitimate, non-discriminatory reason for its action. See Normand v. Research Institute of Am., Inc., 927 F.2d 857, 859 (5th Cir. 1991).

To meet this burden, Xerox explained why it treated the two employees differently: The company had not decided to locate the competency center in Dallas until January 1987, and by that time Layman had already agreed to relocate; Wilson had re-

jected the company's offer to relocate prior to any knowledge that jobs would be available in Dallas; and the jobs available in the competency center were technical, rather than marketing, positions. We agree with the district court that this evidence was more than sufficient to raise a genuine issue of fact as to whether Xerox discriminated against Layman because of her age.

The presumption of intentional discrimination was thus dispelled and the burden reverted to Layman to prove that Xerox's reasons were pretextual. The only evidence Layman offered in this regard, however, was her belief that Wilson was given the job in Dallas on the day her relocation authorization form was signed. Contrary to this belief, the evidence showed that the competency center was still in the planning stages in November 1986. Moreover, we do not think this evidence was sufficient to create a jury issue as to whether Xerox denied Layman the job because of her age. In short, we agree with the district court that Layman failed to present sufficient evidence demonstrating that Xerox's articulated reasons for treating Layman differently were pretextual.

IV

For the foregoing reasons, the judgment of the district is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ELIZABETH LAYMAN,	§	
	§	
Plaintiff-Counterdefendant,	§	
	§	Civil Action
		No. CA3-87 -1733-D
VS.	§	
	§	
XEROX CORPORATION,	§	
	§	
Defendant-Counterplaintiff.	§	

MEMORANDUM OPINION
AND ORDER

In this civil action that was tried in part to a jury and in part to the court, the court's deep respect for the right of trial by jury and of the jury's sole province as finder of facts must yield to the stark reality that the jury's verdict on one claim is not supported by substantial evidence and that the other claim is in part time-barred and in part not supported by substantial evidence. The court is therefore compelled to grant defendant's motion for judgment notwithstanding the verdict. Because the court also finds for the defendant as to the portion of the case tried nonjury,

and because the jury verdict rejecting defendant's counterclaim is supported by the record, the court today enters a take nothing judgment as to plaintiff's claims and defendant's counterclaim.

I

Plaintiff Elizabeth Layman ("Layman") sued defendant Xerox Corporation ("Xerox") alleging age discrimination and retaliation, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and pendent state law claims for fraudulent misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of written and oral contract, and breach of an implied covenant of good faith and fair dealing. Xerox counterclaimed on a common law fraud theory.[1] Prior to trial the court granted summary judgment in favor of Xerox as to all of Layman's claims except those brought pursuant to the ADEA and Title VII and her pendent state claims for fraud and breach of duty of good faith and fair dealing. See Mem. Op. & Order (August 11, 1989).

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[1] Xerox sought leave at trial to amend its counterclaim to add a theory of recovery for breach of an at-will contract. The court denied leave because the theory was not set forth in the amended pretrial order and would unfairly prejudice Layman. The court has not considered Xerox' post-verdict motion to the extent directed at this theory of recovery since the theory is not before the court.

The case thereafter proceeded to trial. All evidence was presented at once, but the court sat as trier of fact as to plaintiff's sex discrimination claim and the jury was the fact-finder for plaintiff's age discrimination and pendent state claims and for defendant's counterclaim. After Layman rested her case in chief, the court granted a directed verdict in favor of Xerox on Layman's claim for breach of good faith and fair dealing. With the exception of the sex discrimination claim, Layman's remaining claims, as well as Xerox' fraud counterclaim, were submitted to the jury. The jury found in favor of Layman, awarding $145,000 in damages on plaintiff's ADEA claim and $139,716 in compensatory damages and $8.75 million in punitive damages on her fraud claim.

Xerox now moves for judgment notwithstanding the verdict (JNOV) and for a new trial. Layman moves for entry of judgment on the verdict. The court also has before it for decision plaintiff's sex discrimination claim. On April 9, 1990 the court issued an order directing the parties to address certain issues.[2]

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[2] The additional briefing was limited to six questions:

(1) the effect, if any, upon Xerox' contention that Layman's fraud claim is barred by the statute of frauds of the court's conclusion in its August 11, 1989 memorandum opinion and order that the relocation authorization signed by Xerox was sufficient to satisfy the statute of frauds;

(2) the effect, if any, upon Xerox' contention that it fulfilled its promise to provide plaintiff "a job" of Xerox' signing the relocation authorization after plaintiff had qualified the conditions of her relocation;

(Footnote continued on next page)

Briefing on these and other questions continued through July 27, 1990.[3] The court conducted oral argument on August 30, 1990 and now decides the pending motions and Layman's sex discrimination claim. The court conducted oral argument on August 30, 1990 and now decides the pending motions and Layman's sex discrimination claim.

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[2] *(Footnote continued from previous page)*

(3) whether plaintiff's common law fraud claim rests solely on the October 7, 1986 oral representation made by Ray Knight;

(4) each specific act plaintiff contends constituted unlawful age discrimination, the date (if known) on which the act occurred, and the date on which plaintiff contends she became aware of the age discrimination;

(5) the effect of Xerox' failure to request a jury finding regarding equitable estoppel on the limitations period relevant to plaintiff's age discrimination claim; and

(6) the effect of plaintiff's requesting specific damages in closing argument on Xerox' post-verdict challenge to the damage award.

[3] The parties' post-verdict briefing has been marked by numerous personal accusations, increasing rancor, and a myriad of disputes unrelated to the substantive questions before the court. Cf. Dondi Properties Corp. v. Commerce Sav. and Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988) (en banc) (establishing standards of litigation conduct for attorneys appearing in civil actions in this district).

II

The court first considers Xerox' motion for JNOV. Judgment notwithstanding the verdict should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. Gates v. Shell Offshore, Inc., 881 F.2d 215, 216-17 (5th Cir. 1989), cert. denied, __ U.S. __ 110 S.Ct. 1320 (1990) (citing Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)). All reasonable inferences are to be drawn in the nonmovant's favor, but all the evidence in the case, rather than just the evidence favorable to the nonmovant, is to be considered. Id.

A

Xerox contends it is entitled to JNOV on Layman's common law fraud claim because the claim is barred by the statute of frauds. According to Xerox, the fraud claim is in essence a breach of contract claim dressed in the garb of tort and is accordingly subject to the statute of frauds. Layman responds that the statute of frauds is inapplicable. The court agrees with Layman.

Texas courts have not spoken with a unified voice in addressing the question whether the statute of frauds is applicable to a common law fraud claim. In Sibley v. Southland Life Ins. Co., 36 S.W.2d 145 (Tex. 1931), a purchaser of real estate sued to recover damages caused by an allegedly false promise made by the seller in connection with the transaction. Id. at 145. The seller argued his promise was not enforceable because it was

oral and thus barred by the statute of frauds. Id. at 146. The court rejected this contention, reasoning the statute did not apply because "the cause of action growing out of such promise...is grounded in tort and not in contract." Id. The court thus concluded that "[r]esponsibility for the tort committed is not affected by the fact that the false promise was made orally." Id.

While Sibley could be read as establishing a per se rule that fraud claims are not barred by the statute of frauds, several courts have declined to accept this reading. See, e.g., Benoit v. Polysar Gulf Coast, Inc., 728 S.W.2d 403, 408 (Tex. App. 1987, writ ref'd n.r.e.) (fraud claim based on unenforceable employment contract barred by statute of frauds); Webber v. M. W. Kellog Co., 720 S.W.2d 124, 129 (Tex. App. 1986, writ ref'd n.r.e.) (fraud claim based on unenforceable oral agreement barred by statute of frauds); Keriotis v. Lombardo Rental Trust, 607 S.W.2d 44, 45-46 (Tex. Civ. App. 1980, writ ref'd n.r.e.) (statutory fraud claim based on oral agreement to sell land barred by statute of frauds). See also McClure v. Duggan, 674 F.Supp. 211, 219-23 (N.D. Tex. 1987) (Mahon, J.) (discussing Texas law). A number of courts have distinguished Sibley, reasoning that where a plaintiff is "seeking to recover what he would have gained had the promise been performed, it is apparent that his action, while cast in language sounding in tort, is an indirect attempt to recover for the breach of the unenforceable promise and is, therefore, barred by the statute of frauds." Webber, 720 S.W.2d at 129 (quoting Collins v. McCombs, 511 S.W.2d 745, 747 (Tex. Civ. App. 1974, writ ref'd n.r.e.). Other courts have

attempted to reconcile Sibley with later cases, drawing a distinction between alleged representations purely promissory in nature (barred by statute of frauds) and factual misrepresentations (not barred). E.g., McClure, 674 F.Supp. at 222. Recent Texas precedent suggests that both approaches are incorrect, and cites Sibley for the proposition that "[t]he statute of frauds is not a defense to any action for damages based on fraud or breach of fiduciary duty, both being tort actions." Turner v. PV Int'l Corp., 765 S.W.2d 455, 461 (Tex. App. 1988), writ denied per curiam, 778 S.W.2d 865 (Tex. 1989).

The court's review of the apposite cases indicates the Texas Supreme Court has never overruled or departed from the strict rule of Sibley. That intermediate Texas courts have developed differing standards does not authorize this Erie court to depart from Sibley. Cf. Allstate Ins. Co. v. Shelby, 672 F.Supp. 956, 958 (N.D. Tex. 1987) (decision of Texas intermediate court is controlling absent strong indication Texas Supreme Court would decide question differently). Accordingly, because the claim submitted to the jury was grounded in tort and not in contract, the court holds the statute of frauds does not bar the claim.[4]

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[4] The same result flows from applying the Webber court's analysis to this case. Here, Layman did not seek as damages the amount she would have received had the oral promise been enforced, but instead sought compensatory damages for injuries occasioned by her reliance on the promise. Because the nature of her damages related to the fraud claim differ from those related to a contract-based claim, her cause of action in tort survives the statute of frauds.

B

Xerox next argues that JNOV must be granted as to Layman's fraud claim because there is no substantial evidence of a false promise and no substantial evidence that Xerox had the intent not to perform any promise at the time the promise was made. The court's careful review of the trial transcript indicates Xerox is correct.

1

To recover on a fraud claim under Texas law, a plaintiff is required to prove that: (1) a material misrepresentation was made; (2) it was false; (3) the speaker knew it was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (4) the speaker made the representation with the intent that plaintiff should act on it; (5) plaintiff acted in reliance upon the representation; and (6) thereby suffered injury. E.g., Trenholm v. Ratcliff, 646 S.W.2d 927, 930 (Tex. 1983). A promise to do an act in the future is actionable fraud when made with the intention, design, and purpose of deceiving, and with no intention of performing the act. Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434 (Tex. 1986) (citing cases). Intent is a question of fact "uniquely within the realm of the trier of fact" and may be inferred from the party's subsequent acts after the representation is made. Id.

The evidence shows that in the Fall of 1986, the Xerox Business Systems Group in Dallas, Texas and Rochester, New York commenced a process of marketing consolidation and resizing. Certain Xerox employees in these two cities were

asked to relocate to El Segundo, California. Xerox contends the only basis for Layman's fraud claim is a promise by Robert Knight (''Knight''). At an October 7, 1986 meeting of Dallas-based Xerox employees, Knight promised the several employees (including Layman) in attendance that there would be a job available at Xerox for all exempt employees[5] who agreed to relocate to El Segundo, California. Xerox posits that, because the evidence adduced at trial in fact demonstrated that Layman was offered but rejected jobs in El Segundo on two occasions, there was no false promise and there could not have been actionable fraud. Xerox further contends the evidence of its substantial performance is uncontradicted and accordingly negates any inference of fraud. Xerox finally avers that Layman failed to introduce evidence that Xerox or Knight did not intend to keep the October 7, 1986 promise at the time it was made.

Layman responds that on November 10, 1986 she sent a letter to Eva Sage (''Sage''), a Xerox personnel officer, qualifying the conditions of her acceptance to include only her current job or a comparable job. Because Xerox signed Layman's relocation authorization after her attempt to qualify the conditions of acceptance, Layman submits that Xerox was required to provide her a job in accordance with the conditions set forth in her November 10 letter. Layman also contends her fraud claim is not dependent solely upon the representations made by Knight

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[5] Layman was an exempt employee.

at the October 7, 1986 meeting. She points to other representations in the record that she contends were fraudulent, including that all relocations would be completed by April 1987, that benefits and expenses would be paid to employees accepting relocations, and that no jobs in the Dallas area were available.

The court holds as a threshold matter that Layman's fraud claim must stand or fall on the basis of the evidence of representations made by Knight in 1986, related actions taken by Layman and Xerox subsequent to those representations, and inferences reasonably drawn from that evidence. From the start of this action, Layman's fraud theory has been predicated upon the contention that Xerox fraudulently induced her to relocate to California by promising her a job there without the intent to perform its promise. Her fraud claim was submitted to the jury on this theory. She is not entitled post-trial to search the record for other representations that were not fairly included in the amended pretrial order.[6]

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[6] The amended pretrial order contains this fraud contention:

> Plaintiff further claims that the Defendant has made intentional misrepresentations of material facts to Plaintiff with the intent of inducing her to relocate for employment in California. Plaintiff further claims that after so agreeing to move to California, and selling her home at the inducement of Defendant, Defendant thereafter failed and refused to move her to California .... (Pretrial Order at § 4(A)(3)).

[6] *(Footnote continued on next page)*

The record reflects the following sequence of events. In October 1986 certain Dallas-based Xerox employees, including Layman, were informed by Knight that all marketing functions under Knight were being relocated to California. Tr. 4:118.[7]

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[6] *(Footnote continued on next page)*

Although Layman argues that this contention is broad enough to encompass a theory that Xerox committed fraud by representing there were no jobs available in Dallas, the court concludes it is not.

The parties are entitled to interpret the contentions in the pretrial order in light of the contested fact issues set forth therein. There are 98 disputed fact issues listed. The only reference to the unavailability of jobs is to "no job available ... in El Segundo, California." (Disputed Fact No. 24). The pretrial order does not indicate in any way that the parties contest whether Layman was told that no jobs existed in Dallas. At best, the amended pretrial order suggests the parties disagree whether Xerox refused to provide Layman with organization charts she requested (Disputed Fact No. 70) and whether Sage had been instructed not to provide information concerning the existence of jobs in Dallas. (Disputed Fact No. 71). Xerox could not be expected on the basis of these listed items to understand that Layman contended she had been defrauded on the basis of being affirmatively told no jobs existed in Dallas, especially given the way Layman's fraud claim in § 4(A)(3) is framed. The parties are bound by the pretrial order and may not introduce at trial issues excluded by the pretrial order. Randolph County v. Alabama Power Co., 784 F.2d 1067, 1072, modified on other grounds, 798 F.2d 425 (11th Cir. 1986), cert. denied, 479 U.S. 1032 (1987) (upholding district court's exclusion in fraud case of various misrepresentations not included in pretrial order). Thus the court concludes Layman may not pursue her theory that Xerox defrauded her by affirmatively stating no jobs existed in Dallas.

[7] Transcript references are to the transcript volume and page.

Knight guaranteed that a job in California would be available for each exempt employee who agreed to relocate. Id. Knight's representations were memorialized in an October 7, 1986 written relocation package (PX 200688) provided to all affected employees. Xerox established November 14, 1986 as the date employee relocation decisions for both Dallas and Rochester employees were due. PX 200689.

The relocation benefits package provided to all employees explained the reasons for the relocation, informed employees that relocation would take place from January to April 1987, explained relocation procedures, and set forth the applicable procedure for those employees unwilling or unable to relocate to California. Tr. 4:120-126; PX 200688. The package repeated Knight's guarantee of a job for all exempt employees willing to relocate. Id. The document also stated that some job restructuring was expected, and that Xerox had no intention either of reducing or increasing overall grade levels, although it was possible in exceptional cases that the only available position would be lower than the employee's current grade level. Id.

Xerox tentatively scheduled an October 23, 1986 meeting in Dallas to provide real estate information to affected employees. PX 200689. Layman attended the meeting and additionally met with Sage on October 24 to discuss relocation. Tr. 4:131. She thereafter went to California for a site visit, id., but did not receive certain "job scoping" information Xerox had earlier indicated would be available. Id.

On November 10, 1986 Layman sent a memo to Ken Larson (''Larson''), a Xerox officer, informing him she was ''willing to relocate to El Segundo during 1987 under the relocation plan presented to us providing my current or comparable job is available to me in El Segundo and providing the appraisal/ selling process progresses according to plan.'' PX 200708. Layman's memo additionally requested specific information on position openings and job descriptions. Id. Layman's understanding was that she had agreed to accept a marketing job in California in Knight's organization beginning approximately January 1, 1987. Tr. 4:144.

On November 17, 1986 Layman again spoke with Sage regarding relocation. Layman and Sage specifically discussed Layman's November 10, 1986 memo. Layman's notes of the meeting (DX 371) reflect that Sage informed Layman the ''same or comparable job'' condition Layman had set forth was ''not sufficient'' because the possibility existed that Layman would have to take a job in California as low as two grades below her current job. Id. Layman responded that this contingency was unacceptable. Id. Layman and Sage nevertheless continued to discuss relocation procedures.

On November 18, 1986 Layman sent a letter to Knight expressing her dissatisfaction with the lack of information available regarding specific job openings in California. Knight suggested in a November 21 memo that Layman meet with Joan Bigham (''Bigham'') in an attempt to determine how Xerox could help Layman. PX 110200. On November 21, 1986

Bigham signed a form authorizing Layman's relocation to California. PX 200713. Sage signed the document on November 23, 1986. PX 110201. The relocation form described Layman's new position, salary, and division/department as "TBD." Id.

In December 1986, at the request of Bigham, Layman met with Bill McKissock ("McKissock") regarding a potential position. Tr. 4:145. McKissock explained what Layman's responsibilities would be in California and informed Layman he needed her in California five days a week beginning January 1987. Id. at 146. Layman never received a job offer confirmation sheet from McKissock, although she made further inquiries about the confirmation letter. Id. at 146-47. Xerox subsequently purchased Layman's Dallas home pursuant to its relocation procedure. See DX 34.

On January 5, 1987 Layman sent an internal memo (PX 200894) to Sage summarizing a December 17, 1986 meeting between the two. Layman's memo set forth her understanding of the California job situation. She identified three job possibilities flowing from relocation: (1) an upgrade with 4% promotional increase; (2) a downgrade with salary protected for one year; and (3) a lateral grade job. PX 200894. Layman's memo also set forth her understanding that no corporate rules governing the timing of relocation had been put in place. Id. The document also included her understanding of acceptance/rejection options. Id.

On April 6, 1987 Layman had a telephone conference with Larry Spelhaug (''Spelhaug'') regarding a specific position in California. Tr. 6:85. Spelhaug read to Layman a memo (DX 257A) sent to him by Owen Brown (''Brown''). Tr. 6:87. The memo Spelhaug read to Layman was in all material respects the same as an April 9, 1987 memo (PX 110217) from Spelhaug to Layman.[8] See Tr. 6:93-95. Spelhaug informed Layman she was being offered a position in El Segundo, California entitled ''Manager Special Projects.'' Tr. 6:89; PX 110217. In her new position Layman would stay in her current grade, work for Knight's marketing organization, report to Spelhaug, and receive a five percent increase in salary plus relocation benefits. Tr. 6:89-91; PX 110217. The effective date for Layman's new position would be April 1, 1987. PX 110217. Layman objected to Spelhaug regarding the proposed position, and informed him she saw no need for him to send her a copy of the Brown memo. Tr. 6:95-96.

On June 15, 1987 Layman purchased a home in San Antonio, Texas. Tr. 6:101; DX 33. Layman continued to be paid her full salary by Xerox. On July 22, 1987 Layman had another telephone conversation with Spelhaug regarding a position in California. Tr. 6:114-15. Layman recorded the conversation. Id. at 121; see PX 200848. Spelhaug read to Layman an offer

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[8] It is unclear whether Layman actually received the April 9, 1987 memo. The record indicates the terms of the memo were conveyed to Layman over the telephone. Tr. 6:87,91.

dated July 13, 1987 detailing a position entitled Desktop Publishing Markets Manager. PX 200848. The position called for a lateral transfer at grade 14, a five percent increase in salary, and normal relocation benefits. Id. Layman and Spelhaug agreed Layman would have until August 1, 1987 to consider the offer. Id. Spelhaug informed Layman she would be sent a written offer letter the next day. Id. Layman did not actually receive a written offer until August 10, 1987. Tr. 6:122.

On July 28, 1987 Layman wrote to Spelhaug telling him she had not yet received a written offer letter. PX 200850. Layman did not inform Spelhaug or Xerox that her address had changed or that she intended to take vacation in August. Tr. 6:127. On August 17, 1987 Allan Ayars (''Ayars''), manager of Desktop Publishing Product Marketing, sent a memo to Sage informing Sage he had attempted on numerous occasions but was unable to contact Layman regarding her job offer. PX 110226. Ayars informed Sage that, because he could not reach Layman, he must ''regretfully'' withdraw his job offer. Id. On August 12 Layman sent a letter (PX 200851) to Spelhaug informing him she was taking vacation until late September. Tr. 6:127. Unknown to Xerox, Layman started law school in San Antonio on August 24,1987. See Tr. 6:129. On September 26, 1987 Layman sent a memo to Jack Kravitz declining the position offered and requesting advice regarding the procedure for salary continuance. PX 200856; Tr. 6:129. While attending law school full time, Layman continued to receive her full salary from Xerox, id. at 130-136, and received salary continuance

effective February 9, 1988 through August 9, 1988 at the rate of $5,426 per month. Tr. 6:140. Layman officially ended her tenure at Xerox on March 4, 1988 in an exit interview with Sage. Id.

3

In determining whether this evidence supports the jury's verdict on Layman's fraud claim, the court turns to the full standard of review utilized by the Fifth Circuit in assessing JNOV motions:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the nonmover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable (persons) could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded (persons) in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of facts, and not of the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boyle v. Pool Offshore Co., 893 F.2d 713, 715-16 (5th Cir. 1990) (quoting Shipman, 411 F.2d at 374-75). This standard recognizes and maintains the fundamental role juries serve in the justice system, while at the same time preserving the court's role to ensure that jury verdicts are indeed supported by record evidence.

Considering all the evidence in the case, and drawing all inferences in Layman's favor, the court holds there is no substantial evidence to support the jury's verdict on Layman's fraud claim. The evidence in the record permitted the jury to conclude that Xerox, as part of an organizational change, made a decision to transfer certain marketing functions from Dallas and Rochester to El Segundo, California. All exempt employees, including Layman, were given the opportunity to relocate and were guaranteed a job in California if they agreed to relocate. Uncontested facts in the record demonstrate that Xerox' operations in California were largely undefined at the time the relocation was announced. The record is also uncontested that, in its written relocation package, Xerox informed employees that it had no intention of either increasing or reducing job grade levels but the possibility existed in exceptional cases that some grade levels would have to be reduced.

The record also shows Layman informed Xerox she wished to relocate only if her "current or comparable job" was available in California and that Xerox, through Sage, informed Layman that her conditions might not be satisfied. Xerox thereafter took steps that were consistent with Layman's being

relocated to California, including signing a relocation authorization form for Layman. It is undisputed that the relocation authorization form did not describe a specific job, but instead described Layman's potential position as "TBD."

During the entirety of this period Layman continually recognized and expressed dissatisfaction with the fact that Xerox had not defined in detail the jobs available in California. In her January 5, 1987 memo to Sage, Layman set forth her understanding that she could receive a lateral transfer or even a downgrade in the relocation. Layman nonetheless continued to act in a manner consistent with relocating, taking various trips to California and selling her Dallas home to Xerox. Xerox at all times continued to pay Layman her full salary and to take steps consistent with relocating Layman.

In April 1987 Xerox offered Layman a job which she did not find acceptable. The offer permitted Layman to remain in her current grade and provided for an increase in salary plus relocation benefits. In July 1987 Xerox made Layman a second offer. This was also for a job equivalent in grade to her present job and at an increased salary plus relocation benefits. Layman requested a written offer letter on July 28, 1987 but did not contact Xerox again until August 14, 1987. Xerox attempted to contact Layman but was unable to do so. Layman enrolled in law school, rejected the July job offer in September 1987, and requested information about salary continuance. Layman received full salary through January 1988 and received salary continuance from February 1988 through August 1988.

The inferences the jury could have drawn in Layman's favor are meager. Layman's fraud theory was that Xerox promised it would relocate her to, and provide her employment in, California and did not intend to perform its promise. The jury could have believed -- and the record supports -- that Xerox guaranteed a job in California to all exempt Dallas and Rochester employees willing to relocate. The jury was also entitled to infer from Layman's testimony that she was willing to relocate only to her current or comparable job. The record does not support, however, an inference that Xerox promised Layman such a job. Indeed, the only evidence of such a promise is Layman's November 10, 1986 memo in which Layman -- not Xerox -- placed qualifications on relocation. Layman's theory that Xerox promised to perform in the manner she alleges is rebutted by her own evidence, including her handwritten notes detailing her December 17, 1986 meeting with Sage and her January 5, 1987 memo to Sage, both of which show that Layman had been informed her conditions were unacceptable and were not within the options available to her. There is no substantial evidence in the record that Xerox at any time prior to April 1987 promised Layman a specific job.

Absent evidence of a promise for a specific job, Layman is left with Xerox' guarantee of a job in California for all exempt employees willing to relocate. The evidence adduced at trial demonstrates Layman was offered a job on two occasions and that Xerox authorized Layman to relocate and undertook several steps integral to her relocating. The jury had no basis to ignore

the existence of this evidence or to conclude Xerox had no intent to find employment for Layman in El Segundo. Layman's subjective objections to the job offers provide no predicate for a finding that Xerox never intended to perform its promise to provide her a job at Xerox in California.

The facts and inferences point overwhelmingly to the conclusion that Xerox promised Layman a job, attempted to find a job suitable for her, offered her a job on two occasions, and that Layman rejected each offer. It is also pellucid from the record that Xerox at all times continued to fully compensate Layman and incurred significant costs in its attempts to relocate her to California. The record is devoid of evidence of the false promise that Layman relies on and is wholly inconsistent with the theory that Xerox did not intend to relocate Layman at the time it promised to provide her a job in California and thereafter. While questions of intent are uniquely within the realm of the jury, an intent finding cannot stand where, as here, the record is substantially contrary to the jury's findings.

In short, there is no substantial evidence that Xerox made a false promise to Layman with an intent not to perform it, nor is there substantial evidence that Xerox ever had the intent not to relocate Layman. The record is replete with evidence to the contrary, and points strongly and overwhelmingly in favor of Xerox. The court reiterates its profound reluctance to disturb a jury verdict. The court is duty-bound to do so, however, where reasonable jurors viewing the evidence in a fair and impartial manner could only have found in favor of Xerox. Xerox'

motion for JNOV on Layman's fraud claim is accordingly granted.

III

Having concluded the jury verdict on the state law fraud claim cannot stand, the court next turns to Layman's federal discrimination claims. Xerox contends the court should enter JNOV on the ADEA claim and enter judgment on the retaliation and sex discrimination claims.

A

The first prong of Xerox' argument regarding both the ADEA and sex discrimination claims is that the bulk of the incidents upon which Layman relies to support these theories of recovery occurred more than 300 days prior to the filing of her discrimination charge with the Equal Employment Opportunity Commission (''EEOC''). Layman contends Xerox waived any limitations argument with respect to the ADEA claim by failing to request a jury finding on the limitations issue. Layman further posits that both her claims should be considered timely by applying equitable exceptions to the limitations bar.

1

The court holds at the outset that Xerox did not waive its limitations argument by failing to request a jury question. Where an EEOC charge is not timely filed, the plaintiff has the burden of demonstrating a factual basis to toll the period. Blumberg v. HCA Management Co., 848 F.2d 642, 644 (5th Cir. 1988) (citing Taylor v. General Tel. Co., 759 F.2d 437, 442 (5th Cir. 1985)), cert. denied, 488 U.S. 1007 (1989). And, if a case

is submitted to the jury on a special verdict and the questions submitted do not cover all the issues in the case, the parties waive a jury trial on the unsubmitted issue by failing to object, but they do not waive their right to findings on the unsubmitted issue. Rather, the court must make findings as the trier of fact. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2574 at 691 (1971). Xerox is thus free to argue to the court that Layman has failed to carry her burden of demonstrating a basis for tolling.[9]

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The court next determines whether the 300-day period was tolled.

Prior to bringing a claim in federal court under the ADEA or Title VII, a party alleging age or sex discrimination must first file an unlawful discrimination charge with the EEOC. In

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[9] The court's prior denial of summary judgment, moreover, presents no impediment to its consideration of the limitations question. The court's statement that a fact question was presented regarding "when Layman realized her troublesome tenure at Xerox might have been a result of discrimination" can be read to focus at least in part on the wrong factors. The court is nevertheless free to determine from the evidence at trial when Layman was or should have been aware of the facts that would support a charge of discrimination. See Blumberg, 848 F.2d at 644-45. The court's prior denial of summary judgment presents no impediment to the court's considering the limitations question anew on motion for JNOV. See, e.g., Pruet, 784 F.2d at 1278 (rejecting argument that trial court's denial of employer's summary judgment motion precluded directed verdict on equitable tolling issue).

deferral states[10] such as Texas, an aggrieved party must file her EEOC charge within 300 days after the alleged unlawful practice occurred. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d)(2); Mennor v. Fort Hood Nat'l Bank, 829 F.2d 553, 554-55 (5th Cir. 1987) (Title VII claim); Clark v. Resistoflex Co., 854 F.2d 762, 765 (5th Cir. 1988) (age claim). The 300-day filing period is not jurisdictional, but rather is more akin to and operates as a limitations period. E.g., Blumberg, 848 F.2d at 644; Pruet Prod. Co. v. Ayles, 784 F.2d 1275, 1279 (5th Cir. 1986). The period commences on the date the alleged unlawful practice occurred. Waltman v. International Paper Co., 875 F.2d 468, 474 (5th Cir. 1989) (citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980)); Chapman v. Homco, Inc., 886 F.2d 756, 758 (5th Cir. 1989), cert. denied, __ U.S. __, 110 S.Ct. 1784 (1990).

In order to alleviate the sometimes harsh consequences of a limitations bar, courts have developed three related but distinct equitable exceptions that operate to toll the limitations period. The first of these exceptions is termed equitable estoppel. Equitable estoppel may properly be invoked "when the employee's untimeliness in filing his charge results from either

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[10] A deferral state is one in which (1) a state law prohibiting discrimination in employment is in effect and (2) a state authority has been set up to grant or seek relief from such discriminatory practice. See Mannor v. Fort Hood Nat'l Bank, 829 F.2d 553, 554-55 (5th Cir. 1987) (Title VII claim); Clark v. Resistoflex Co., 854 F.2d 762, 765 n.1 (5th Cir. 1988) (citing 29 U.S.C. §§626(d) and 633(b)) (age claim).

the employer's 'deliberate design' to delay the filing or actions that the employer 'should unmistakeably have understood' would result in the employee's delay.'' Clark, 854 F.2d at 769 (citing and quoting Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987)).

The second exception is termed equitable tolling. The Fifth Circuit has identified three possible bases for tolling under this exception: (1) the pendency of a suit between the same parties in the wrong forum; (2) plaintiff's unawareness of facts giving rise to the claim because of defendant's intentional concealment of them; and (3) the EEOC's misleading the plaintiff about the nature of her rights. Blumberg, 848 F.2d at 644 (citing Chappell v. Emco Mach. Works Co., 601 F.2d 1295, 1302-3 (5th Cir. 1979)). Equitable tolling does not halt the limitations period until an employee learns of an employer's discriminatory motive, and there is no requirement that a plaintiff be made aware of all evidence before the limitations period begins to run. Id. at 645. See also Chapman, 886 F.2d at 758 (rejecting plaintiff's argument that statute was tolled until plaintiff understood discharge was discriminatory). The inquiry under both equitable estoppel and equitable tolling[11] is instead more limited, focusing on the point in time at which facts that would support a cause of action are or should be apparent. See Blumberg, 848

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[11] These exceptions have at times been treated as distinct, see Clark, 854 F.2d at 769 n.4, and on other occasions merged into one doctrine, see, e.g., Pruet, 784 F. 2d at 1279-80.

F.2d at 645. "[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975) (emphasis added).

The final equitable exception is termed the "continuing violation" exception, and arises "[w]here the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." Waltman, 875 F.2d at 474 (quoting Abrams v. Baylor College of Medicine, 805 F.2d 528, 532 (5th Cir. 1986)). The plaintiff must show a series of related acts, one of which falls within the 300-day limitations period, to establish a continuing violation. Waltman, 875 F.2d at 474-75; Berry v. Board of Supervisors, 715 F.2d 971, 979 (5th Cir. 1983). A plaintiff may not employ the continuing violation theory to resurrect past discrimination claims, even where the effects of that discrimination persist. Id. (citations omitted).

In considering whether a plaintiff is entitled to rely on a continuing violation theory, courts are guided by the factors set forth in Berry:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g. a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should

> indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Id. at 981.

Layman has identified numerous incidents she now contends evidence age and sex discrimination.[12] These span in time from June 1984 to January 1987. Layman did not file her charge of discrimination with the EEOC until May 11, 1987. The 300-day limitations period thus extended from July 16, 1986 to May 11, 1987. It necessarily follows that, unless Layman can demonstrate the existence of one of the equitable exceptions, any claims arising prior to July 16, 1986 are time-barred and may not be considered in support of the jury's verdict on plaintiff's ADEA claim or serve as the basis for judgment on her sex discrimination claim.

Equitable estoppel applies when an employer deliberately takes actions to delay an employee's filing of an EEOC charge or where the employer should unmistakably have understood that its actions would delay filing. Clark, 854 F.2d at 769. The only arguable basis for assertion of equitable estoppel is Layman's contention that she relied on Xerox' "open door" policy to resolve her disputes. The presence of an open door policy at Xerox cannot be construed as a policy which is deliberately

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[12] Layman relies on many of these instances for the first time in her post-trial briefing.

designed to delay filing of EEOC charges. The employee is not offered any benefit as a quid pro quo for pursuing complaints through the open door system rather than through legal mechanisms. Cf. id. (termination benefits contingent upon failure to assert ADEA rights); 785 F.2d at 519-20 (severance benefits offered as quid pro quo for employee's failure to communicate with an attorney). Similarly, the employee is not penalized (and by law cannot be) for the employee's choice to pursue complaints of discrimination with the EEOC rather than through the open door policy. Absent some element of coercion, the court cannot conclude that the institution of corporate dispute resolution mechanisms is a basis for equitable estoppel. Moreover, the court declines to hold that Xerox abused its open door policy in an attempt to delay Layman's suit. Layman chose not to file EEOC complaints when she could have done so.

The only arguable basis in the record for an equitable tolling argument is evidence that David T. Kearns (''Kearns''), president of Xerox, made certain false representations in response to a letter Layman wrote to Kearns. In a June 7, 1984 letter (PX 200155), Layman referenced a November 1983 meeting conducted between Kearns and the Majority Women's Steering Committee (of which Layman was a member), in which was discussed the possibility of the committee's taking legal action against Xerox for discrimination. Id. Layman attached a series of documents[13] to her letter and informed Kearns they described

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[13] PX 200156 - 200169

"four specific instances where Xerox has failed to deal equitably with an employee and has adversely impacted the employee's reporting level, grade level, monetary compensation (salary and bonus), and upward mobility -- this is discrimination!" Id. The "four instances to which Layman referred were: (1) a November 1983 downgrade of Layman's job level (PX 200156-57); (2) Layman's failure to receive a full bonus in 1983 (PX 200158-60); (3) Layman's failure to receive greater than a 5.5% merit increase for 1984 (PX 200161-68); and (4) Layman's change in job responsibilities due to a November 1983 reorganization (PX 200169).

An investigation into Layman's complaints was conducted at Kearns' request. In a July 20, 1984 letter to Layman, Kearns addressed each of her concerns, informing her that "I do not feel that you have been discriminated against during the last two years. I know my response may disappoint you, but I am satisfied that your situation was handled appropriately." PX 200173. Layman contends Kearns' letter was inaccurate because it contained a reference to a performance appraisal that in fact had not been conducted and because it noted that a reorganization caused Layman's job responsibilities to diminish when in fact Layman's former position was given to another employee at a higher grade level than Layman had held. On the basis of this evidence, Layman avers that Xerox is precluded from relying on a limitations defense. The court disagrees.

Equitable tolling requires more than a mere misrepresentation by an employer. An employer is not equitably estopped

whenever it does not disclose a violation of the statute. See Blumberg, 848 F.2d at 645 (plaintiff contended employer was equitably estopped because employer provided misleading information concerning reason for her discharge). Rather, the relevant inquiry is whether the employer intentionally concealed information that would have allowed the plaintiff to evaluate the veracity of the employer's representations. See Id. The record demonstrates that as of June 7, 1984 Layman believed she had been the victim of discrimination. Although Layman contends she believed Kearns' response, and was thus dissuaded from pursuing her discrimination claims, Layman has not identified any crucial information Xerox withheld which prevented her from correctly evaluating the truthfulness of the response. Indeed the record overwhelmingly supports the proposition that Layman at all times was aware of, and had access to, the facts she characterizes as constituting age and sex discrimination.

At best, Layman was unaware until she met with her lawyers in 1987 that Xerox' motives might be characterized as discriminatory. Xerox cannot, however, be held accountable for Layman's failure to realize the possible legal implications of the facts available to her. See Merrill v. Southern Methodist Univ., 806 F.2d 600, 604-5 (5th Cir. 1986) (rejecting argument that in determining whether action is barred court should focus on date victim first perceives discriminatory motive caused act). That Layman "did not perceive the tactics and patterns as age related until she spoke with her attorney in 4/87," P. Post-Verdict Brief

of Special Issues at 8, does not alter her prior awareness of or access to the facts underlying her claims. Layman's factual awareness is fatal to her equitable tolling argument.

Finally, there is no basis for applying a continuing violation theory. Several of the actions of which Layman complains, such as her demotion and the denial of jobs, were sufficiently discrete and completed acts that they must be regarded as individual events. The adverse consequences of a demotion or denial of a job can be expected to continue without any further intent to discriminate. The theory of continuing violation "has to be guardedly employed because within it are the seeds of the destruction of statutes of limitation." Abrams, 805 F.2d at 833. The demotions and denials of jobs of which Layman complains cannot be held to be ambiguous acts that can only be characterized as discriminatory in relation to other similar acts. Cf. id. at 532 (characterizing continuing violation as an "unlawful employment practice [which] manifests itself over time, rather than as a series of discrete acts"). Thus Layman's demotion and the denial of jobs within Xerox cannot be characterized as a part of a continuing violation.

Other actions of which Layman complains are more ambiguous. Examples include the denial of travel opportunities, the removal of office furniture and equipment, the cancellation of her telephone card, her exclusion from a staff meeting, and denial of access to certain documents or information. The difficulty with the assertion of these and similar acts as part of a chain of continuing violation is that the individual acts do not

involve the same subject matter and occurred sporadically. See Berry, 715 F.2d at 981. They simply do not suggest that Layman was being systematically harassed or discriminated against on the basis of either her sex or age. Accordingly, the court concludes no continuing violation occurred. Layman may therefore recover for age or sex discrimination only on the basis of acts that occurred between July 16, 1986 and May 11, 1987.

B

The court now turns to the record to determine as a matter of law whether there is substantial evidence of age discrimination within the pertinent period and to decide, as fact-finder, whether Layman was retaliated against on the basis of age and whether she is entitled to recover on her sex discrimination claim.

1

The court considers first the question whether the jury's verdict that Layman was the victim of age discrimination is supported by substantial evidence.

In a case such as this where the plaintiff's proof of disparate treatment is circumstantial, the plaintiff's claim must be analyzed under the test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Specifically, the plaintiff must establish a prima facie case of intentional discrimination. Once the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). The burden of production then shifts to the employer to articulate

some legitimate, nondiscriminatory reason for the action. Id. at 254. If the employer meets its burden, the plaintiff may establish discrimination by showing that the employer's proffered reason is pretextual. Id. at 256.[14]

The elements of a plaintiff's prima facie case will vary depending upon the nature of the event of which the plaintiff complains. McDonnell Douglas, 411 U.S. at 802 n.13. The actions that fall within 300 days of the filing of Layman's EEOC complaint can be divided into two categories: (1) those which arguably amount to harassment and (2) the denial of a job. To

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[14] In a mixed motives case, the plaintiff need not establish pretext. Rather, once the plaintiff proves an impermissible factor played a motivating part in an employment decision, the defendant can avoid liability only if it shows it would have made the same decision had it not considered the impermissible factor. Price Waterhouse v. Hopkins, __ U.S. _, 109 S. Ct. 1775, 1787-88 (1989). Contrary to the position Layman takes in her post-trial briefing, this is not a mixed motives case. The plaintiff in a mixed motives case must prove the employer actually relied on an impermissible factor. See id. at 1791. The plurality in Price Waterhouse declined to specify how a plaintiff could prove actual reliance. Justice O'Connor, however, in casting the decisive vote in the case, noted the plaintiff must show "by direct evidence that discriminatory animus played a significant or substantial role in the employment decision." Id. at 1804 (O'Connor, J., concurring) (quoting Hopkins v. Price Waterhouse, 825 F.2d 458, 470-71 (D.C. Cir. 1987)). Layman's evidence in this case is entirely circumstantial and thus lacks the directness required by Price Waterhouse.

establish a prima facie case of harassment[15] an employee must establish that she is a member of a protected class, she was subject to harassment, the harassment was based upon membership in the protected class, the harassment was sufficiently severe as to alter the conditions of employment and create an abusive working environment, and the employer knew or should have known of the harassment in question and failed to take prompt remedial action. See Waltman, 875 F.2d at 477 (sexual harassment case). To establish a prima facie case of discrimination based on denial of a job, the plaintiff must show that she is a member of a protected class, that she was qualified for the job in question, and that an employee outside of the protected class was more favorably treated. Laurence v. Chevron. U.S.A., Inc., 885 F.2d 280, 283 (5th Cir. 1989) (age discrimination case).

In support of the harassment claim, during the period between July 16, 1986 and May 11, 1987 the following events occurred: (1) Layman was denied certain travel opportunities; (2) a staff meeting was conducted in her absence; (3) various items were removed from her office without her consent; (4) her telephone card was cancelled; and (5) she was denied certain documents. The record is devoid of substantial evidence that

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[15] It is unclear whether harassment based on age, as opposed to sex, is actionable. The court will assume, without deciding, that such a claim is actionable.

would permit the jury to infer that these occurrences were motivated in any way by Layman's age. Construing the evidence in the light most favorable to Layman, a jury might reasonably have concluded that Layman had been treated unfairly. That finding alone is insufficient to impose liability. Rather, the evidence must have allowed the jury to conclude that Layman was treated unfairly based on her age. Laurence, 885 F.2d at 284-85 (reversing jury verdict finding violation of the ADEA because evidence did not establish unfairness was motivated by consideration of age). It is clear that Layman failed to establish a prima facie case of harassment based upon age.

Layman also failed to establish that she was denied the technical competency center job given to Wendell Wilson (''Wilson'') based upon her age. The only plausible theory that would allow recovery by Layman is that Xerox lied to Layman about the availability of jobs in Dallas to induce her to choose relocation to California while informing Wilson and other younger candidates of the availability of jobs in Dallas in an effort to avoid considering Layman for the position ultimately given to Wilson. The court must determine whether the jury was permitted to base its verdict on this theory. The court first inquires whether substantial evidence supports each element of the prima facie case. It is undisputed that Layman was a member of the protected class and Wilson was younger at the time he received the technical competency center position in Dallas. Layman was also required, however, to prove she was qualified for the position Wilson was given. There is no record evidence

establishing what qualifications the job required. And the only evidence concerning Layman's qualifications for the job was her own testimony that she was qualified and that she had been told she was ''an ideal match'' for jobs in the technical competency center. Xerox contends that Layman's own self-serving testimony is insufficient to establish her qualifications. See, e.g., Laurence, 885 F.2d at 284-85 (plaintiff's assertion that he was qualified based on his own assessment of job qualifications was insufficient to show that promotion of another candidate was not based on other candidate's qualifications); Ford v. General Motors, 656 F.2d 117, 119 (5th Cir. Unit B 1981) (plaintiff's testimony that he could handle any position was insufficient evidence to allow the case to reach the jury); see also Bohrer v. Hanes Corp., 715 F.2d 213, 219 (5th Cir. 1983), cert. denied 465 U.S. 1026 (1984) (plaintiff's own testimony that his performance is adequate is generally insufficient to establish pretext). The court agrees and concludes that Layman failed to present sufficient evidence to allow the jury to conclude that she possessed the qualifications for the job given to Wilson.

Moreover, even if the jury was entitled to conclude that Layman demonstrated her qualification for the job, the record shows that Xerox met its burden of producing a legitimate reason for its actions and that Layman failed to adduce substantial evidence of pretext.

It is important to note that Xerox' burden of articulating a legitimate reason for its actions is a burden of production only, not one of persuasion. Bohrer, 715 F.2d at 218. The plaintiff

carries the burden of persuasion and must either discredit the articulated rationale or show that age more likely influenced the decision. Id. Xerox met its burden of production by introducing evidence that the existence of the jobs in Dallas was not disclosed to Layman because it was not settled that the competency center would be located in Dallas until after Layman elected to relocate, that Wilson had rejected the offer to relocate prior to any knowledge that jobs would be available in Dallas, and that the jobs available in the competency center were technical rather than marketing jobs. This evidence was sufficient to raise a question whether Layman was not told of or offered a job in Dallas because of her age. Thus the presumption of age discrimination was dispelled and Layman was required to show that Xerox' reason was pretextual. See Id.

The only evidence in the trial record that would tend to discredit Xerox' articulated rationale was Layman's own testimony that Wilson was given the job in Dallas on the very day her relocation authorization form was signed. She was unable, however, to establish a basis for her belief that Wilson received the job on that day. Layman's testimony was contradicted by every other witness who testified on the subject and the documentary evidence shows that the competency center was still in the planning stages in November 1987. The jury was not entitled to base its verdict on the unsubstantiated scintilla of proof offered by Layman to discredit Xerox' articulated reason. Cf. Boyle, 893 F.2d at 715-17.

2

The court next turns to Layman's retaliation claim. In order to establish her claim Layman must show retaliation based upon filing her EEOC age discrimination complaint.[16]

Retaliation for filing an age discrimination claim is made unlawful by 29 U.S.C. § 623(d). To establish a prima facie case of retaliation, a plaintiff must show that she engaged in a protected activity, an adverse employment action occurred, and a causal connection exists between participation in the protected activity and the adverse employment decision. Cf. Gonzalez v. Carlin, 907 F.2d 573, 578 (5th Cir. 1990) (retaliation based on filing sex discrimination claim). The court sits as trier of fact on the retaliation claim because no party requested its submission to the jury.

Layman argues she has shown retaliation by establishing that after filing her EEOC complaint she was relegated to accepting an entry level position, far below her qualifications, and contrary to Xerox representations regarding the reorganization and job opportunities in the Dallas area. Even if the court accepts as correct Layman's belief that she was offered only entry level positions, the court remains unpersuaded that any

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[16] At trial Layman attempted to introduce evidence that appeared to be directed at retaliation for asserting a charge of sex discrimination. The court concluded the pretrial order referred only to retaliation for filing an age discrimination claim, see amended pretrial order at § 4(A)(2), and sustained an objection to the evidence. See Tr. IB 47-48, 50-51. A retaliation claim based upon sex was not tried by consent.

evidence shows this occurred because Layman filed an age discrimination complaint. First, there is no evidence that any of the individuals involved in determining what jobs Layman would be offered were even aware of the filing of the complaint. Second, Xerox had advised its employees from the outset of the discussions concerning the relocation that their grades might not remain the same. Thus the court declines to find any nexus between Layman's age claim and the jobs offered to her. Nor does the court find any other evidence of retaliation in the record. In fact, most of the events of which Layman complains occurred far in advance of the filing of the age complaint. The court concludes there are no grounds for a retaliation claim.

3

The court last addresses Layman's sex discrimination claim. This claim is predicated on the same events as Layman's ADEA claim and the court applies the legal standards discussed supra at § III(B)(1) as they pertain to sex discrimination. The court, as finder of fact, concludes Layman has failed to establish sex discrimination.

With regard to the events that Layman contends amounted to harassment, the court finds that Layman established she was a member of a protected class but failed to prove by a preponderance of the evidence that any harassment was a result of her sex. Moreover, the court finds that the harassment was insufficiently severe to alter the terms and conditions of employment. Thus Layman has failed to establish a prima facie case of harassment based on her sex.

Layman also failed to prove that she was denied the job given to Wilson on the basis of her sex. It is clear, of course, that Layman is a member of the protected class and Wilson is not. Layman failed to prove that she was qualified for Wilson's position. The evidence showed the competency center positions were technical positions. Although it is conceivable that Layman's background qualified her for such a position, absent evidence of the specific requirements of the job, the court declines to find Layman was qualified.

Additionally, the court concludes that Layman has failed to carry her burden of persuasion on the issue of pretext. The court gives little weight to Layman's testimony that Wilson received the competency center job on the same day her relocation authorization form was signed. Her statement was contradicted by every other witness who testified on the subject and was uncorroborated by any documentary evidence. Rather, the court believes Xerox' explanation that Wilson initially decided he did not want to relocate without knowledge that Xerox would have jobs available in Dallas, Layman in contrast chose to relocate under the same circumstances, the decision to place the competency center in Dallas was subsequently made, and Layman was not considered for the competency center job because Xerox believed she planned to move to California. Layman failed to establish any nexus between her treatment and her sex.

Title VII is not designed to assure that members of protected classes are treated fairly or that employment decisions are correct in all respects. Rather, it is intended to ensure that

members of a protected class are not discriminated against upon a basis proscribed by law. The court finds that Layman failed to prove her sex entered the calculus in determining how she would be treated.

IV

Having disposed of Xerox' motion for JNOV and Layman's motion for judgment as set forth above, the court need not address the parties' remaining contentions or Xerox' motion for new trial. Layman's motion for entry of judgment is denied except as to dismissing Xerox' counterclaim for fraud.[17] Xerox' motion for judgment NOV is granted to the extent set forth and is otherwise denied. The court will file a judgment today.

SO ORDERED.

September 17, 1990.

(Signed) Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

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[17] The court need not discuss in detail Xerox' counterclaim for fraud The jury had an adequate basis on which to reject Xerox'fraud counterclaim.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ELIZABETH LAYMAN,	§	
	§	
	§	
Plaintiff-Counterdefendant,	§	
	§	Civil Action No. CA3-87-1733-D
	§	
VS.	§	
	§	
XEROX CORPORATION,	§	
	§	
Defendant-Counterplaintiff,	§	

JUDGMENT

For the reasons set forth in the court's memorandum opinions filed August 11, 1989 and today, it is ORDERED and ADJUDGED that plaintiff Elizabeth Layman ("Layman") take nothing from defendant Xerox Corporation ("Xerox") on her claims against Xerox and that these claims be dismissed with prejudice. Based upon the jury verdict returned in this action on January 9, 1990, it is ORDERED and ADJUDGED that Xerox take nothing from Layman on its counterclaim and that the

counterclaim be dismissed with prejudice. Costs of court as calculated by the clerk of court are taxed 75% to Layman and 25% to Xerox.

Done at Dallas, Texas this 17th day of September, 1990.

(Signed) Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

APPENDIX C

§621. Congressional Statement of Findings and Purpose

(a) The Congress hereby finds and declares that -

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 U.S.C. §§621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age dis-

crimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§626. Recordkeeping, Investigation, and Enforcement

...

(d) Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 U.S.C. §633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

42 U.S.C. §2000e-5

...

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2)

No. 91-582

In The

Supreme Court of the United States

October Term, 1991

ELIZABETH LAYMAN,

Petitioner,

v.

XEROX CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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SUBSIDIARIES OF XEROX CORPORATION

Xerox Corporation does not have a parent corporation. Its nonwholly owned subsidiaries are as follows:

AMTX, Inc.
Advanced Forming Technology
Century Data Systems, Inc.
Copicentro S.A.
GESCAN International
Image Sciences, Inc.
Katun Corporation
Kurzweil Applied Intelligence
Optimem
Opto Generic Devices, Inc.
Rank Xerox Holding B.V.
Rank Xerox Investments Limited
R-X Holdings Limited
Rank Xerox Limited
Fuji Xerox Co., Ltd.
Indian Xerographic Systems Limited
Modi Xerox Limited
Rank Xerox (Nigeria) Limited
Rank Xerox Portugal Equipamentos de Escritorio, Limitada
Selectronics, Inc.
Spectra Diode Laboratories, Inc.
The Genra Group, Inc.
Verbex Voice Systems, Inc.
Xerox de Bolivia Limitada
Xerox Canada Inc.
Xerox de Columbia S.A.
Xerox de El Salvador, S.A. de C.V.
Xerox de Honduras, S.A.
Xerox (Jamaica) Limited
Xerox de Panama, S.A.
Xerox del Peru, S.A.
Xerox Trinidad Limited
Xerox Zona Libre, S.A.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

A. PROCEDURAL HISTORY 1

B. STATEMENT OF FACTS 2

REASONS FOR DENYING THE PETITION 9

I. SUMMARY OF REASONS FOR DENYING THE PETITION 9

II. THERE IS NO CONFLICT AMONG AND WITHIN THE CIRCUIT COURTS OVER HOW TO APPLY THE EQUITABLE THEORY OF "CONTINUING VIOLATIONS" 12

III. THERE IS NO EVIDENCE OF A DISCRIMINATORY POLICY 19

IV. THE COURT OF APPEALS CORRECTLY HELD THAT LIMITATIONS WERE NOT TOLLED 20

V. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT LAYMAN WAS NOT ENTITLED TO BASE HER CLAIM OF FRAUD ON THE ALLEGED MISREPRESENTATION OF NO AVAILABLE DALLAS JOBS 22

VI. THE COURT OF APPEALS CORRECTLY HELD THAT LAYMAN DID NOT PROVE HER FRAUD CLAIM 24

CONCLUSION AND REQUEST FOR DAMAGES ... 27

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986) 19, 20

Alveari v. American Int'l Group, 590 F. Supp. 228 (S.D.N.Y. 1984) 17

Berry v. Board of Supervisors of Louisiana State Univ., 715 F.2d 971 (5th Cir. 1983), cert. denied, 479 U.S. 868 (1986) ..... *passim*

Bruno v. Western Elec. Co., 829 F.2d 957 (10th Cir. 1987) 14, 15

Caudill v. Farmland Indus., 698 F. Supp. 1476 (W.D. Mo. 1988) 17

Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980) 18

EEOC v. Penton Indus. Publishing Co., 851 F.2d 835 (6th Cir. 1988) 14, 17

Flannery v. Carroll, 676 F.2d 126 (5th Cir. 1982) ..22, 23

Furr v. AT&T Technologies, Inc., 824 F.2d 1537 (10th Cir. 1987) 14

Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554 (5th Cir. 1985) 19

Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988) 14

Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472 (9th Cir. 1989) 13, 16

TABLE OF AUTHORITIES – Continued

Page

Johnson v. General Elec., 840 F.2d 132 (1st Cir. 1988) 14

Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179 (1st Cir. 1989) 13, 15

McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) 14, 16

Nickerson v. G. D. Searle & Co., 900 F.2d 412 (1st Cir. 1990) 23

Roberts v. Gadsden Memorial Hosp., 835 F.2d 793 (11th Cir. 1988) 14, 17

Rochon v. Attorney Gen. of the United States, 734 F. Supp. 543 (D.D.C. 1990) 16

Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33, 921 F.2d 396 (1st Cir. 1990) 15

Shepard v. Adams, 670 F. Supp. 22 (D.D.C. 1987) 16

United Air Lines v. Evans, 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977) 18

Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) 13

Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir.), cert. denied, 459 U.S. 971 (1982) 14

Wimberg v. University of Evansville, 761 F. Supp. 587 (S.D. Ind. 1989) 17

Zipes v. Trans World Airlines, 445 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982) 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

29 U.S.C. § 626(d)(2) 20

Fed. R. Civ. P. 49(a) 15, 21

Fed. R. Civ. P. 52(a) 15, 21

S. Ct. R. 42 27

No. 91-582

In The

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ELIZABETH LAYMAN,

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v.

XEROX CORPORATION,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Xerox Corporation ("Xerox"), respectfully requests that this Court deny the petition for writ of certiorari of petitioner, Elizabeth Layman ("Layman").

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Generally, Xerox does not disagree with Layman's statement of the procedural history of this case in the courts below. However, with regard to the partial summary judgment entered on August 11, 1989, the trial court held that, because she had enrolled as a full-time student at St. Mary's University School of Law in San Antonio,

Texas, in August 1987, while she was still a full-time employee of Xerox near Dallas, Texas, Layman could not recover future pay, nor could she receive back pay for the time that duplicates time spent in law school. Memorandum Opinion and Order of Aug. 11, 1989 at 2-3.

Layman asserts that, with regard to Xerox' Motion and Brief to Alter or Amend Memorandum Opinion and Order and Request for Ruling on Motion for New Trial, the trial court "entered its Order denying Xerox's request for the conditional granting of a Motion for New Trial." Pet. at 3. This is not correct. The trial court conditionally *granted* a new trial to Xerox "in the event that this court reverses its JNOV but that, in any event, a new trial should not be granted on Xerox's counterclaim." Pet. App. A at 7a.

B. STATEMENT OF FACTS

Xerox particularly disagrees with Layman's statement of the relevant facts in this case. Since Layman's petition is at its heart nothing more than an attempt to persuade this Court to review the legal sufficiency of the evidence, it is important to set out the relevant uncontradicted evidence on which the trial court based the judgment notwithstanding the verdict ("JNOV"), as affirmed by the court of appeals. The lower courts held that Layman failed to prove her claims as a matter of law.

Layman was employed by Xerox on May 27, 1980, when she was 37 years old. PX-110118. In November, 1982, she was named Software Marketing Manager in the internal organization known as Office Products Division ("OPD"). Tr. 1B:25-26; PX-110146. Due to a reorganization

in November 1983, which affected a large number of employees in OPD, Layman was assigned to the position of Manager of Business Development. *Id.*; Tr. 1B:54; 12:117-21. Layman's salary was not affected but her grade level was changed back to a grade 14 from grade 15 effective November 1, 1983. PX-110118. During her entire employment with Xerox, she received at least a merit salary increase every year. *Id.* By the time she left Xerox, Layman was earning $65,112.00 annually. *Id.*

Because Layman was dissatisfied with the job changes in November 1983, Layman availed herself of Xerox' open door policy and wrote a letter directly to David Kearns, president of Xerox. Tr. 3:17. In her letter of June 7, 1984, she complained about four matters which she alleged were acts of discrimination. *See* PX-200155-69. None of her complaints accused Xerox of having discriminated against her on the basis of her age. *Id.* Kearns responded to Layman by his letter of July 20, 1984, in which he addressed each of Layman's four complaints. PX-200173. After she received Kearns' July 1984 response to her open door letter, Layman learned by late summer 1984 that Joan Bigham had been assigned to a position also called Software Marketing Manager. TR. 1B:55. She responded, "[T]hat's my job," and began trying to find out who Bigham was. Tr. 3:115-16. As soon as she heard of Bigham's job, Layman investigated the job duties. Tr. 3:111. She testified at trial that, after her investigation, she did not believe the two jobs were the same. Tr. 1B:55. Even the job numbers were *not* the same. *See* PX-110118; DX-685A. Furthermore, Bigham's position was in a completely different organization than that in which Layman

worked, and Bigham reported to a different manager. PX-200175; Tr. 3:109.

After investigating Bigham and her new job as Software Marketing Manager, Layman accepted a position in Bigham's organization and started working for Bigham effective April 1, 1985, as Marketing Program Manager. Tr. 3:114-15; PX-110118. At trial, Layman offered no evidence that the duties of the two jobs titled Software Marketing Manager were the same. Furthermore, Layman offered no evidence as to what Bigham's duties were.

In 1986, Xerox made two major decisions which affected the jobs of many employees across the country, including Layman's group in Dallas. Tr. 9:28. First, Xerox decided to get out of the software business; second, Xerox consolidated its marketing functions in California under the management of Bob Knight, a vice president. Tr. 9:8-16, 31-32. On October 7, 1986, Knight announced to approximately thirty Dallas employees, including Layman, that all marketing functions under his management were being transferred to California. Tr. 4:118; 9:12-14. The employees were given the opportunity to relocate to El Segundo, California. Some functions would be transferred to El Segundo; others, including Layman's entire group headed by Bigham, were to be dissolved. In other words, Layman's group and their jobs ceased to exist. Tr. 3:134, 176. Many of the incidences of alleged harassment to which Layman refers in her petition, such as removing furniture and phones from her office and travel restrictions, related to the dissolution of Layman's group and relocation of offices from Dallas to Lewisville. *See, e.g.*, Tr. 5:32-33; 7B:83-84.

At the meeting, another employee asked Knight if there would be a job for everyone who wanted to go to El Segundo; Knight responded, yes, which was consistent with the written materials given to the employees. The written package relating to the October 7 meeting included the following question and answer:

> Is there a job for everyone who wants to go to El Segundo?
>
> Yes, positions will be available for exempt employees who want to move to El Segundo, CA.

PX-200688. No promises were made as to the specifics or qualities of the jobs in California, as is shown by another question and answer from the written package:

> Will the California positions be at the same level as my current position?
>
> There is no intention of either reducing or increasing overall grade levels in restructuring the organization. On an individual basis, the impact is difficult to assess at this time. *There may be some cases where the only available position is lower than current grade level.*

Id. (emphasis added). Furthermore, no job guarantees were given to those employees who elected not to relocate. Tr. 7:94. They took their chances on finding, or not finding, other jobs within Xerox, since their jobs, like Layman's, no longer existed in Dallas. *See e.g.*, Tr. 7:56; 9:52-53.

All employees, including Layman, who expressed an interest in relocating were invited to El Segundo in late October 1986, to view the area and to meet real estate

brokers in order to assess their desire to move and take a job in El Segundo. PX-200696; PX-200700; Tr. 9:44-45.

On November 10, 1986, Layman informed Xerox that she would relocate. PX-112605. In addition, she attempted to expand the parameters of Knight's offer for a job by requesting that her offer be for her "current for a comparable" job and that the appraisal/selling process of her house in Lewisville progress according to plan – additions which were not part of the October 7 promise. *Id.* In her petition, Layman states unequivocally that "Xerox accepted the condition." Pet. at 5. However, she admits that on November 17, 1986, Eva Sage, the personnel manager responsible for Layman's group, told Layman that these "conditions" were not acceptable to Xerox. DX-371; *see also* Tr. 9:114.

At Layman's request, Xerox obtained independent appraisals to establish the market price for her house and, through Merrill Lynch, offered to buy Layman's house at that price. Although she could have kept the house or sold it on her own, Layman accepted the offer on January 19, 1987 (a month before the offer expired), and closed on the sale on January 23, 1987. PX-200707; DX-34. Xerox paid Merrill Lynch $20,063.82 in closing costs for the purchase and subsequently resold the house at a loss. Tr. 9:43; 10:32.

On November 18, 1986, Layman wrote to Knight expressing her frustration at not having information on her job. PX-200711. In addition to instructing Layman's manager to assist, Knight responded directly to Layman on November 21, 1987, to confirm that he had received her letter. PX-112605; PX-110200. Knight also stated, "I'll

be happy to meet with you at your convenience," after Layman's manager had a chance to provide her with information. PX-110200. There is no evidence that, after she received Knight's letter, Layman ever sought a meeting, information or clarification from Knight.

Layman's manager, Bigham, and personnel representative, Sage, arranged for an interview with Bill McKissock, a Xerox manager in El Segundo. Tr. 5:25-26; 9:91-93. Layman subsequently flew to El Segundo at Xerox' expense and met with McKissock to interview for a job. PX-200747. McKissock was then trying to put together his new organization under Knight to handle desktop publishing. Tr. 6:71-72. A position for Layman never materialized because McKissock did not receive approval to set up the department he had proposed. Tr. 5:62-63; 9:90-93.

In February 1987, Sage suggested that Layman contact three other managers to discuss jobs. Tr. 9:97-98; PX-200777. Layman never fully followed up on these suggestions, but she did meet with Larry Spelhaug in March 1987 in El Segundo. Tr. 5:63-65. In all, Xerox paid for Layman to travel to El Segundo at least three times – in October and December 1986 and March 1987 – either to view the area or to discuss possible jobs. PX-200747; PX-200700; Tr. 5:69; Tr. 6:56-57.

Spelhaug, who worked in Knight's organization, first offered Layman a job in early April 1987, with the title of Manager Special Projects, at a lateral grade 14, at a monthly salary of $5,697.00 (a 5% increase), to-be effective April 1, 1987. The job provided all the relocation benefits discussed at the October 7, 1986, announcement meeting.

PX-110217. Layman rejected the job over the telephone and instructed Spelhaug not even to bother sending her the written offer. On May 11, 1987, Layman filed her complaint with the Equal Employment Opportunity Commission ("EEOC"). DX-243.

Meanwhile, Layman had already taken the Law School Admissions Test on September 27, 1986. She began applying to Texas law schools[1] on November 6, 1986 (four days before she told Xerox she was willing to move to California) and was finally accepted by St. Mary's University School of Law located in San Antonio, Texas. DX-35; DX-24; DX-25; Tr. 6:57. On June 15, 1987, Layman bought a house in San Antonio, Texas. DX-33.

On July 22, 1987, Spelhaug telephoned Layman about another position in California. Tr. 6:114-15. Spelhaug read to Layman an offer dated July 13, 1987, for a position entitled Desktop Publishing Markets Manager. PX-200848; PX-110220. The position provided for a lateral transfer at grade 14, a 5% increase in salary and full relocation benefits. PX-110220; PX-200688.

On August 12, 1987, just two days after admittedly receiving the written offer, Layman wrote to Spelhaug to inform him that she would be on vacation until the end of September. Tr. 6:127-28; PX-200851. She started law school in San Antonio as a full-time student on August 24, 1987. Tr. 6:129. Finally, on September 26, 1987, Layman sent a memo declining the position offered and requesting advice regarding the procedure for salary continuance. PX-200856; Tr. 6:129.

---

[1] She applied only to Texas law schools.

While attending law school full-time, Layman continued to be employed full-time by Xerox and to receive full salary and benefits through February 9, 1988. Tr. 6:130-36. She still had not told Xerox that she had enrolled in law school or bought a house in San Antonio. Tr. 6:115. From February 9, 1988, through August 9, 1988, she received salary continuance in the full amount of her salary of $5,426.00 per month plus benefits. Tr. 6:140. Thus, in total, Xerox paid Layman eleven full months' salary of $59,686.00 plus benefits after she entered law school in San Antonio as a full-time student. She finally gave Xerox her San Antonio address on March 4, 1988, at her exit interview, but she *never* told any of her managers at Xerox that she had enrolled in law school while she was still ostensibly working for Xerox. Tr. 6:64-66, 115, 127, 129, 130, 140, 157; 7:66, 83; PX-200877.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF REASONS FOR DENYING THE PETITION

This case is not worthy of review by this Court. What Layman really seeks is a review of the sufficiency of the evidence which she produced at trial on the merits. Two lower federal courts have already thoroughly performed that task. Indeed, the district court rendered JNOV against Layman *only* after reviewing the entire trial transcript and after exhaustive briefing by both parties. Both lower courts reached identical decisions – Layman simply failed to prove her case.

Contrary to Layman's contention, there is no conflict between the standards applied by the Fifth Circuit to Layman's continuing violation theory and the standards applied by other circuit courts. The so-called "three part test" applied by the Fifth Circuit is not a test at all but merely an articulation of three possible considerations to be used in determining whether, under the facts and context of each case which involves a series of alleged related acts, a plaintiff has shown a sufficient relationship between the alleged acts to allow the plaintiff to recover for acts committed outside the ADEA limitations period. The results of the inquiry are thus fact specific: "This inquiry, of necessity, turns on the facts and context of each particular case." *Berry v. Board of Supervisors of Louisiana State Univ.*, 715 F.2d 971, 981 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986). *Berry* correctly states the law on this issue, and the other circuits are in accord. Furthermore, the factors stated in *Berry*, as applied by the Fifth and other circuits, are consistent with controlling decisions of this Court.

Even if Layman were correct in arguing that there is a conflict among the circuits, this is not an appropriate case for reviewing the continuing violation theory. Layman argues that other circuits only look to whether a discriminatory policy is in place. However, even if her argument were correct, Layman offered absolutely no evidence of a discriminatory policy which caused the alleged disparate treatment. Finally, Layman admits in her petition that all circuits require a plaintiff to prove a discriminatory act within the statutory period in order to invoke the continuing violation theory. After a thorough review of the transcript of the entire trial and after

exhaustive briefing by both parties, the courts below concluded that Layman had failed to prove a violation of the ADEA based on any alleged act within the 300-day filing period. Thus, because she did not establish a violation within the 300-day filing period, Layman cannot succeed on her continuing violation theory.

With regard to the two-part second question presented by Layman in her petition, there is no substantial evidence to support Layman's fraud claim, which is based on the promise Knight made to approximately thirty employees in October 1987, to provide jobs to everyone who would volunteer to relocate to California. The promise was not false, because Xerox substantially performed Knight's promise by, among other things, paying for her trips to California and giving her two separate job offers which would have provided her a marketing job in Knight's organization at a salary increase and with full relocation benefits. Layman rejected both of these offers.

Post-trial, Layman attempted to allege a completely new theory of fraud based on the allegation that she was told there were no jobs in Dallas, and that this statement was false. The trial court properly held that this new theory was not included in the pretrial order. However, even if the theory had been in the pretrial order, Layman failed to prove this claim. She never offered any evidence as to who supposedly made the statement to her, nor is there any evidence of when this statement was allegedly made. Thus, there is no evidence that the representation was false at the time it was made and no evidence that when it was made the speaker knew it was untrue. For these reasons Layman's petition should be denied.

II. THERE IS NO CONFLICT AMONG AND WITHIN THE CIRCUIT COURTS OVER HOW TO APPLY THE EQUITABLE THEORY OF "CONTINUING VIOLATIONS"

Contrary to Layman's contention, there is no conflict between and among the circuit courts in their application of the statute of limitations in ADEA cases. Layman bases her argument on an incorrect reading of Fifth Circuit cases and an incomplete reading of authority from other circuits. At page 9 of the petition, she cites a total of four cases which allegedly conflict with the Fifth Circuit (one each from the First, Ninth, Tenth and District of Columbia Circuits), declares these to be a "majority" of the circuits, and asks this Court to adopt what she erroneously contends is the general rule stated by these cases. As Xerox will demonstrate, these and other circuit courts are not in conflict in how they determine whether a continuing violation exists to toll the limitations period in ADEA cases. There is thus no reason for this Court to grant writ of certiorari to adopt a standard which the circuit courts, including the Fifth Circuit, are already applying.

As a threshold matter, Layman incorrectly characterizes *Berry v. Board of Supervisors of Louisiana State University*, 715 F.2d 971 (5th Cir. 1983), *cert. denied*, 479 U.S. 868 (1986), as creating a "cumbersome three part test" for determining whether a continuing violation exists. On the contrary, the Fifth Circuit makes it perfectly clear in *Berry* that determination of a continuing violation *cannot* be reduced to a formula, and that the factors suggested are not all inclusive:

> Courts have not formulated a clear standard for determining when alleged discriminatory acts

> are related closely enough to constitute a continuing violation and when they are merely discrete, isolated, and completed acts which must be regarded as individual violations. . . . This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, which we discuss, but by no means consider to be exhaustive. . . . As noted, the particular context of individual employment situations requires a fact-specific inquiry by a trial judge which cannot be easily reduced to a formula. We feel, however, that consideration of the above factors will generally be appropriate.

Id. at 981-82. Thus, the *Berry* case does not establish a rigid set of steps to be followed in every continuing violation case, but simply articulates a guideline of three factors which ought generally to apply to continuing violation claims based on a series of allegedly related acts.

As a second incorrect premise, Layman fails to recognize that the factors outlined in *Berry* apply to only one of at least two different lines of inquiry which courts have used to determine whether a plaintiff can prove a continuing violation: "A plaintiff can prove a continuing violation *either* by producing evidence of a series of discriminatory acts *or* by demonstrating that the defendant has a policy of discriminating." *Waltman v. International Paper Co.*, 875 F.2d 468, 475 (5th Cir. 1989) (emphasis added). *See also, e.g., Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 183 (1st Cir. 1989) (serial violations are interlinked succession of related events; systematic violations involve some continuing policy); *Green v. Los Angeles*

County Superintendent of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989) (continuing violation can be established by series of related acts or company-wide policy); *EEOC v. Penton Indus. Publishing Co.*, 851 F.2d 835, 838 (6th Cir. 1988) (same); *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 800-01 (11th Cir. 1988) (same); *Bruno v. Western Elec. Co.*, 829 F.2d 957, 961 (10th Cir. 1987) (same); *McKenzie v. Sawyer*, 684 F.2d 62, 72 (D.C. Cir. 1982) (same).

The cases which Layman cites as demonstrating a conflict between the Fifth Circuit and other circuits concern only complaints of discrimination based on a company policy, not complaints based on a series of related acts. *See Johnson v. General Elec.*, 840 F.2d 132, 136 (1st Cir. 1988) (if statutory violation occurs as a result of continuing illegal policy, then the statute does not foreclose action aimed at enforcement of policy during limitations period); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 614 (10th Cir. 1988) (alleged discriminatory acts occurred under a continuing company policy); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1543 (10th Cir. 1987) (management report introduced into evidence to show overall company policy of age discrimination; claim of age discrimination may be based on continuing policy as long as employer continues to apply policy within limitations period); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982) (employees entitled to pursue claims outside limitations period if they could show discriminatory policy carried forward into limitations period); *McKenzie v. Sawyer*, 684 F.2d 62, 72-73 (D.C. Cir. 1982) (employer's promotion policies and selection policies formed part of same pattern of discrimination). These cases thus are not relevant to cases which

review continuing violation claims based on a series of acts. Indeed, when these same circuits have reviewed continuing violation claims based on a series of allegedly related acts, these courts have applied some or all of the *Berry* factors.

In *Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 400 (1st Cir. 1990), the First Circuit recognizes the two lines of continuing violations: a series of related acts (which it terms serial violations) and a discriminatory policy (which it calls systemic violations). *See also Mack*, 871 F.2d at 183-84 (discussing the difference between serial violations and systemic violations). The *Sabree* case, which involves a series of allegedly related acts, or a serial violation, expressly applies one of the factors suggested by the Fifth Circuit in *Berry* to determine "whether a substantial relationship exists to justify an expanded remedy." *Sabree*, 921 F.2d at 401-02.

Similarly, in considering a claim based on a series of acts, the Tenth Circuit, in a case not cited by Layman, cites *Berry* for the proposition that "[t]he question in the present case thus boils down to whether sufficient evidence supports a determination that the 'alleged discriminatory acts are related closely enough to constitute a continuing violation.' " *Bruno v. Western Elec. Co.*, 829 F.2d 957, 961 (6th Cir. 1988) (citing *Berry*). The *Bruno* case does not expressly apply any of the factors suggested in *Berry*, but holds that the trial court's finding of fact that a series of events was sufficiently related and a continuing violation existed was not clearly erroneous under Fed. R. Civ. P. 49(a) and 52(a). However, the Tenth Circuit, first, recognizes the difference between a continuing violation based

on a company policy and one based on a series of related acts and, second, relies upon *Berry* for its holding on a claim based on a series of related acts.

The Ninth Circuit, in another case not cited by Layman, also discusses the difference in the two lines of claims based on an alleged continuing violation in *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480-81 (9th Cir. 1989). The *Green* case involves allegations of a series of incidents, which the court found to be separate, rather than related, acts. The Ninth Circuit did not discuss the *Berry* factors, but the court did acknowledge that *Berry* applies to those cases involving allegations of a series of related acts. Implicit in both the Ninth and the Tenth Circuits' reliance on *Berry* in these circumstances is the recognition that *Berry* is not some aberration in the law of continuing violation theory but properly states the rule that a series of alleged acts must be sufficiently related in order to justify tolling limitations under the continuing violation theory.

The *McKenzie* case cited by Layman was decided before *Berry*, and Xerox has been unable to locate a case from the District of Columbia circuit court of appeals which cites to *Berry*. Since the decision in *Berry*, however, the district courts of that circuit have consistently applied *Berry* to determine whether a series of acts is sufficiently related. *See Rochon v. Attorney Gen. of the United States*, 734 F. Supp. 543, 548 (D.D.C. 1990); *Shepard v. Adams*, 670 F. Supp. 22, 24-25 (D.D.C 1987).

In addition to the circuits cited by Layman, the Sixth and Eleventh Circuits have also relied upon *Berry* in reviewing continuing violation claims based on a series of

acts. In *EEOC v. Penton Indus. Publishing Co.*, 851 F.2d 835, 838 (6th Cir. 1988), the Sixth Circuit discusses the two categories of continuing violation claims and cites *Berry* under its discussion of claims based on a series of acts. The Eleventh Circuit relies upon, and applies, the factors set out in *Berry* in *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793, 800-01 (11th Cir. 1988). Furthermore, the Eleventh Circuit notes that the factors listed in *Berry* are not exhaustive, *Id.* at 801, and then considers that the decisions on plaintiff's promotions were made by different decisionmakers in finding that a continuing violation did not exist.

In other circuits where Xerox has been unable to find citation to *Berry* by the courts of appeals, the district courts within most of those circuits have either applied the factors or cited to the *Berry* case as authority for decisions on the continuing violation theory. *See Wimberg v. University of Evansville*, 761 F. Supp. 587, 591-92 (S.D. Ind. 1989); *Caudill v. Farmland Indus.*, 698 F. Supp. 1476, 1482-83 (W.D. Mo. 1988); *Alveari v. American Int'l Group*, 590 F. Supp. 228, 231 (S.D.N.Y. 1984).

In the face of this overwhelming authority, Layman cannot in good faith argue that a conflict between the circuits exists as to how determinations regarding continuing violation claims should be made. The lower courts uniformly distinguish between continuing violation claims based on company policy and claims based on a series of allegedly related acts. The courts have correctly applied the *Berry* factors as a guideline for a case-by-case analysis of issues involving a series of acts to determine whether the alleged acts are sufficiently

related to permit application of the continuing violation theory to toll limitations under the ADEA.

These decisions of the courts of appeals and district courts, including the Fifth Circuit's decision in this case, are also consistent with this Court's controlling decisions. This Court has held that a plaintiff may not recover for an alleged act of discrimination which occurs outside the limitations period. *See Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 504, 66 L. Ed. 2d 431 (1980); *United Air Lines v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 1998, 52 L. Ed. 2d 571 (1977). The time for filing a charge of discrimination is, however, subject to the principles of waiver, estoppel and equitable tolling. *Zipes v. Trans World Airlines*, 445 U.S. 385, 102 S. Ct. 1127, 1132, 71 L. Ed. 2d 234 (1982). Consistent with these holdings, the decisions of the courts of appeals cited above allow a plaintiff to rely on the continuing violation theory only if there is an existing discriminatory company policy or a series of sufficiently related acts which extends into the statutory filing period. The factors suggested in *Berry* do nothing more than guide the lower courts in deciding this issue and assuring that a plaintiff does not recover for a stale claim. *See Ricks*, 101 S. Ct. at 505.

Layman must have either completely failed to research whether other circuits have followed *Berry* or deliberately ignored the consistent references to *Berry* in cases from other circuits. The flimsiness of her attempt to manufacture a conflict among the circuits confirms that Layman has no issue to present which is worthy of this Court's review.

III. THERE IS NO EVIDENCE OF A DISCRIMINATORY POLICY

Even if Layman could show a conflict in the circuits, however, this is still not an appropriate case for this Court to review. Layman never raised this so-called conflict in the courts below but brings it for the first time in her petition to this Court. Furthermore, even if the courts below had applied the rule she proposes – that is, that a continuing violation claim may be based on a continuing policy – Layman would not have succeeded on her claim. There is simply no evidence of a discriminatory policy. That there is no evidence to support her position is clear from her own petition filed in this Court; nowhere does she describe what policy was allegedly discriminatory. Further, Layman has not, and cannot, point to any discriminatory effect of some policy, had she proved the existence of one. The only statistics in evidence were offered by Xerox, and those statistics showed that the percentage of employees over 40 in the relevant grade levels increased from 77% in 1983 to 87% in 1987.

Layman relies heavily on *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554 (5th Cir. 1985) and *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), which are legally and factually distinguishable. First, these cases involve discriminatory policies, not a series of related acts. *See Glass*, 757 F.2d at 1560 (continuing policy disfavoring promotion of women); *Abrams*, 805 F.2d at 533 (unlawful policy of precluding Jewish doctors from rotating to hospital in Saudi Arabia). Second, the plaintiffs in both cases had been denied the exact same job three times. Layman, on the other hand, argues in her petition that a myriad of dissimilar events constitutes a continuing violation. The trial court correctly found as a matter of fact that these were individual events not

sufficiently related to invoke the continuing violation theory. As the Fifth Circuit noted in *Abrams*, the continuing violation theory "has to be guardedly employed because within it are the seeds of the destruction of statutes of limitation." 805 F.2d at 833. Last, Layman cannot succeed because she did not prove an actionable violation within the limitations period. Both the district and the appellate courts found as a matter of law that she had failed to prove a claim based on acts which were not barred by limitations. For these reasons, the petition should be denied.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT LIMITATIONS WERE NOT TOLLED

Layman did not file her EEOC charge of discrimination until May 11, 1987. The 300-day limitations period established by the ADEA thus extends from July 16, 1986, to May 11, 1987. *See* 29 U.S.C. § 626(d)(2). Layman claims that the acts of age discrimination extend back to 1984.[2] However, the only back pay which she requested at trial was calculated on the differential between her salary and that of Joan Bigham, who in August 1984 allegedly was named to a position that Layman claims Xerox should have given her. Thus, unless she can toll the 300-day limitations period through application of the continuing

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[2] The trial court noted that she relied on many of these instances for the first time in post-trial briefing. Pet. App. B at 42a n.12.

violation theory,[3] Layman cannot recover any back pay – assuming arguendo that she could prove that the decision to give Bigham the position was an act of age discrimination.

Because neither party requested a jury issue on the continuing violation claim, the trial court was the factfinder under Fed. R. Civ. P. 49(a). Pet. App. B at 37a-38a. Even though, as factfinder, the trial court was not required to view the evidence in the light most favorable to Layman, the trial court's opinion reflects that it conscientiously searched the record for evidence which might support inferences favorable to her on her tolling claim. *See* Pet. App. B at 42a-47a. The trial court found, among other things, that "as of June 7, 1984 Layman believed she had been the victim of discrimination" and that the series of acts upon which she based her claim "were sufficiently discrete and completed acts that they must be regarded as individual events." Pet. App. B at 45a-46a. Under the authorities discussed in part II, above, these findings dispose of Layman's continuing violation claim. There is ample evidence to support the court's findings, which are not clearly erroneous. *See* Fed. R. Civ. P. 52(a).

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[3] Layman's argument in section II of her petition confuses three different tolling theories: equitable tolling, equitable estoppel and continuing violation. *See* Pet. at 13. The trial court thoroughly explained the distinctions between these theories in its opinion. Pet. App. B. at 39a-42a. Layman's arguments in her petition regarding Xerox' alleged concealment of facts is relevant only to the equitable estoppel theory and not to the continuing violation theory. The question which she has presented to this Court concerns only the continuing violation theory.

V. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT LAYMAN WAS NOT ENTITLED TO BASE HER CLAIM OF FRAUD ON THE ALLEGED MISREPRESENTATION OF NO AVAILABLE DALLAS JOBS

Layman also challenges the district court's ruling that her description of her fraud claim in the amended pretrial order was not broad enough to encompass a theory that Xerox committed fraud by representing that there were no jobs available in Dallas. Layman argues that a pretrial order should be construed to permit any issues at trial that are embraced within its language. However, the trial judge who presided during all the pretrial, trial and post-trial stages of this case determined that:

> Xerox could not be expected on the basis of these listed items to understand that Layman contended she had been defrauded on the basis of being affirmatively told no jobs existed in *Dallas*, especially given the way Layman's fraud claim in § 4(A)(3) is framed [in terms of no intent to find her a job in *California*].

Pet. App. B at 26a n.6 (emphasis added).

In asking this Court to second guess the trial judge's reading of the pretrial order and construe it differently, Layman overlooks the courts' long-standing reluctance to interfere with a trial judge's discretion in enforcing pretrial orders and the policy of encouraging trial judges to construe pretrial orders narrowly without fear of reversal. *See Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982)

(district courts encouraged to construe pretrial orders narrowly without fear of reversal).

The Fifth Circuit also recognized in *Flannery* that a broad construction of the pretrial order after the trial had ended "would mean that defendant would be facing the possibility of being held liable under a claim it had no opportunity to evaluate and defend against." *Id.* at 131. As the district court found, this is precisely the situation in this case. The no jobs in Dallas fraud theory emerged for the first time in the post-trial motions and would have constituted serious surprise to Xerox if the pretrial order had been interpreted to accommodate such a theory. Under all the circumstances, the court's construction of the scope of the pretrial order was not arbitrary and should be upheld. *See Nickerson v. G. D. Searle & Co.*, 900 F.2d 412, 422 (1st Cir. 1990).

Furthermore, the *sole* evidence on this theory is Layman's volunteered statement that she had been told "that there were no jobs in Dallas."[4] Tr. 4:166-67. Her ability to rely on this evidence is questionable because the trial court sustained Xerox' objection that this answer was nonresponsive to the pending question during Layman's direct examination. Tr. 4:167. However, even if this is competent evidence to support the jury verdict, Layman never testified as to who made this alleged statement or when it was made. Yet, the timeframe is critical to Layman's claim that the statement was false, because the job

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[4] Layman never referred to this allegation again. The absence of any other evidence on this fraud claim further supports the trial court's holding that this theory is one which Layman developed post-trial.

situation in Dallas in October and November 1986 was so uncertain that the statement could well have been true at the time it was made. *See, e.g.*, Tr. 4:170; 12:21-24. Accordingly, even if one assumes that the pretrial order ought to be read broadly to include Layman's new post-trial theory, Layman offered no substantial evidence that Xerox misled her by falsely representing the unavailability of jobs in Dallas.

VI. THE COURT OF APPEALS CORRECTLY HELD THAT LAYMAN DID NOT PROVE HER FRAUD CLAIM

The promise on which Layman bases her fraud claim was made by Knight at the October 7, 1986, meeting of about thirty Dallas-based employees held to announce the consolidation and resizing decision. He promised a job in California to those employees who volunteered to relocate. On November 10, 1986, Layman informed Xerox that she would relocate. Although she now claims that Xerox accepted her condition that any job offered be for her "current or a comparable job," she admits that Sage informed her that these conditions were not acceptable to Xerox. Layman's own handwritten notes of her conversation with Sage on November 17, 1986, confirm that Sage rejected Layman's attempt to condition her acceptance of the relocation on the availability of a comparable job. DX-371.

At trial, Layman never stated that anyone promised or agreed that her acceptance of the relocation was conditioned on the availability of a comparable job. As the trial court properly found:

> The record does not support, however, an inference that Xerox promised Layman such a job. Indeed, the only evidence of such a promise is Layman's November 10, 1986 memo in which *Layman* – not Xerox – placed qualifications on relocation. . . . There is no substantial evidence in the record that Xerox at any time prior to April 1987 promised Layman a specific job.

Pet. App. B at 35a (emphasis in original).

The uncontradicted evidence at trial demonstrates that Xerox substantially performed its promise to provide Layman a marketing job in Knight's organization in California. After she accepted relocation, Xerox processed Layman's relocation authorization form. PX-200713. At Layman's request, Xerox also arranged for Merrill Lynch to talk with Layman about selling her house in Lewisville. Through Merrill Lynch, Xerox bought her house, paid closing costs and then later sold the house at a loss.

In further performance of its promise to provide Layman a job in California, Xerox did the following:

1. Instructed Layman's managers to help her find a job;

2. Arranged an interview with Bill McKissock;

3. Paid for Layman to travel to California three times in order to look over the area and to interview for jobs and meet prospective new managers;

4. Suggested other managers for her to contact when McKissock's proposed organization did not materialize;

5. Offered her a California job in April 1987 with full relocation salary increase and benefits, which she rejected over the telephone without even wanting to see the documentation; and

6. Offered her a second job in July 1987 again with full relocation salary increase and benefits, which she also rejected, but not until after she enrolled in law school while ostensibly on vacation.

Both job offers fully complied with what Layman testified Knight promised: a marketing job in Knight's organization in El Segundo, California.

There is absolutely no evidence that Knight did not intend to perform his promise at the time he made it. The promise was not made just to Layman, but to thirty other employees who were as affected by the relocation as Layman was. It defies logic to argue that Xerox promised jobs in California to thirty people but intended to perform only for 29 of them and not for Layman. To believe that would require believing that Xerox (1) set up the 1986 relocation, (2) set up the October 7 meeting, (3) spent money to send employees to California, and (4) dissolved Layman's entire group just to make Layman a promise it was not going to keep. Layman's argument is legal and factual nonsense.

The trial court correctly granted Xerox' motion for JNOV. Pet. App. B at 36a-37a. As the Fifth Circuit held in confirming the JNOV, "the record in this case is *overwhelmingly* contrary to the jury's finding that Xerox intended to defraud Layman." Pet. App. A at 12a (emphasis in original).

CONCLUSION AND REQUEST FOR DAMAGES

From the trial court's granting of Xerox' motion for JNOV through the decision of the court of appeals, this case has involved nothing more than a review of the record to determine the sufficiency of Layman's evidence. Both courts held that she had not proved her case, and now she wants this Court to look at the record again. More important, however, there is no conflict among the circuits as to the standards for determining the existence of a continuing violation which will toll limitations in age cases. Layman has no basis for arguing the existence of a conflict, since the very circuits she identifies as being in conflict actually apply the same standards as the Fifth Circuit and even cite to the Fifth Circuit cases which Layman contends are an aberration from the "majority" of circuits. Layman's petition is frivolous and should be denied. Costs, damages and other appropriate relief should be awarded to Xerox pursuant to S. Ct. R. 42.

Respectfully submitted,

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